David W. Young

THE
LAW OF EASEMENTS:

PARRY & HOWES.

THE

Law of Easements:

AN ELEMENTARY TREATISE

BY

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PREFACE.

OF the many rights and obligations attaching to the ownership of land, those which arise in connection with Easements are undoubtedly of very great importance. The fact that an easement does, or does not, exist, may greatly affect the value of a property. For this reason it is essential that those whose duty it is to value, sell, or report upon property should know what rights and obligations an easement entails. It is also an advantage for an owner or purchaser of land to understand what is the effect of an easement on his property.

This book has been written with the object of giving information, on the Law of Easements, to students and other readers who are not members of the Legal Profession.

The Authors have endeavoured to express themselves in plain and simple language, even at the risk of being too elementary, and have avoided as far as possible the use of terms which may not be readily understood by students. Where the use of such terms has been unavoidable, their meanings have been given.

Comparatively few cases have been cited, the object being to embody in the text the principles upon which the decided cases have been based, rather than to give lengthy details in an elementary work.

Those readers who desire a more extensive knowledge of the Law of Easements are referred to the works of the standard authors on the subject.

R. P.
A. B. H.

January, 1910.

ERRATUM.

Page 173, line 5. For "servient" read "dominant."

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THE

LAW OF EASEMENTS.

CHAPTER I.

PROPERTY.

Rights of ownership.

In order to study the subject of Easements, it is necessary to understand clearly what is meant by the term "property," and also what privileges and restrictions are attached to the ownership thereof.

"Property" is *popularly* understood to be a general term applied to any article or thing or collection of things which a man owns; as, for instance, land, buildings and all articles attached thereto; stocks and shares; movable articles, such as tables or chairs; or, in fact, anything which is capable of ownership.

In a *legal* sense the word "property" means the *right* attached to ownership; this may be "absolute"—*e.g.*, the right which a man has to do what he likes to anything belonging to him, such as a chair or a table; or the right may be "qualified"—that is, it may be modified by any obligations which a man may be under by reason of such ownership. For example, a carrier of goods has a "qualified" right of ownership over them whilst they are in his possession for safe delivery.

It would be of no advantage to a man to own anything, unless he were allowed by law to use such thing for his own benefit and enjoyment.

Obligations of ownership.

When we study law we study a subject dealing with rights and obligations in respect of persons and things. Hence the value of any particular thing owned depends solely on, and is measured by, the rights and obligations attending its ownership.

We can roughly distinguish between rights and obligations as follows :—

A right is what a person is legally entitled to do or to enjoy.

An obligation is that which a person is bound to do or to abstain from doing.

The subject of Easements comprises a study of some special rights attaching to the ownership of land.

RIGHTS.

Ordinary rights.

The English law is based on the principle of giving all possible freedom to all subjects of the realm.

There is no complete list of things which a man may or may not do, but the broad principle followed is that he may do anything he likes, provided that in so doing he does not interfere with the rights of another person.

If it were possible to compile a list of all the rights of a person, such list would include every conceivable act that a man is capable of doing, excepting only those acts which are contrary to the law of the land, such as theft, murder, forgery, etc. ; those acts which would prevent another from doing something which he is legally

entitled to do; and those acts which one person has expressly agreed with another not to do.

Every person has a right to the assistance of the law in obtaining redress from others who cause him to suffer an injury, or who do not fulfil their obligations to him.

Rights may be (1) purely personal rights—that is, the right of personal security, comprising those of life, limbs, body, health, reputation, and the right of personal liberty; or (2) rights which are appurtenant (*i.e.*, belonging or pertaining) to the ownership of some article. Thus, a man who owns a horse and cart may drive it along the street; a man who does not own the horse and cart has no such right unless he obtains permission from the owner to do so. A man who possesses a piece of land may walk over such land and may gather his own fruit; a man who does not possess such land or fruit may not do so. These are examples of rights which are appurtenant to the ownership of an article.

Extra-ordinary rights.

In addition to the division of rights into the above two classes, it is of the greatest importance, for the purpose of studying Easements, that we should carefully distinguish in each class between what may be called "ordinary" rights, and "extra-ordinary" or "extended" rights. It will be evident that although a person's rights are in the ordinary way restricted, it is possible in many cases for him to extend them. If a man wishes to exercise more than his ordinary rights, he usually has to pay for that privilege to any person or persons who may be affected by his doing so, because an extension of one man's rights must of necessity

involve a curtailment of the rights of another. However, in certain cases, as will be shown later, where one man has extended his rights for a sufficient length of time without paying for the privilege, he will be legally entitled to continue to do so, even though the rights of another are thereby curtailed.

Personal rights may be extended in many ways; for instance, by being born with, or obtaining afterwards a title, such as a baronetcy or a knighthood; by obtaining permission to walk, ride or drive over land other than a public highway. There are, in fact, thousands of ways by which a person may obtain extended rights or privileges which are purely personal—that is to say, which are not dependent on the ownership of any particular thing.

RIGHTS APPURTENANT TO OWNERSHIP.

Limit of ordinary rights.

(*a*) **Ordinary rights.**—By the mere acquisition of an article the person who acquires it obtains the right to use it in any manner he likes, provided that in so doing he does not infringe the rights of others. Hence we see that the ordinary rights attached to the ownership of anything are limited only by the corresponding rights of others. Thus, a man's right to drive along the street is limited by the right of other persons to use the street. To drive furiously and recklessly would make it impossible for others to use the street with comfort and safety, hence the right of driving is limited to this extent. The exact point at which to draw the line between the rights of one man

and those of another, is settled by the administrators of justice in the Courts of Law.

Consider the case of another class of article—namely, a piece of land. The owner of the land has an ordinary right to do as he pleases with his land: for instance, he may dig out the earth or gravel, etc., and sell it. But supposing he were to excavate the earth to a considerable depth close to his boundary, such an act would most probably cause some of his neighbour's land to fall into the excavated space, and this would be a serious interference with the neighbour's right of support to his land, which, as will be shown later, is a right given by law to all owners of land.

Here, again, we see that an ordinary right must be limited so as not to interfere with the corresponding rights of others.

(*b*) **Extended rights.**—The owner of a thing has many means of extending his ordinary rights, although it must be clearly understood that by so doing he must of necessity interfere with the ordinary rights of someone else. For example, the general public in a street refrain from their full use of the highway when they see a fire-engine coming; they therefore voluntarily give up a portion of their ordinary rights so that the owner of the fire-engine may have an extension of his ordinary rights and drive at what, in the case of any other vehicle, would be considered a furious pace.

Again, an owner of a horse and cart, although having an ordinary right to the use of a public road, has no ordinary right to drive over another's

land. He may, however, be able to make an arrangement with the owner of the land to be allowed to do so, usually by paying him an annual rent for the privilege. In such a case the owner of the horse and cart extends his ordinary rights; but at the same time the ordinary rights of the owner of the land are curtailed, since as long as the arrangement lasts he must allow the owner of the horse and cart to drive over his land, and his own enjoyment of the land is thereby restricted.

In a similar way any of the ordinary rights of an owner of land may be restricted or lost, as, for instance, by one owner A giving permission to an adjoining owner B to excavate so close to his boundary that the land of A falls into the space which B has excavated. Here A's ordinary right of support has been curtailed or abridged by the permission which he has given B to excavate.

When the ordinary rights of one owner of land have been abridged in some way for the benefit of the owner of neighbouring land, the latter is said to possess an *easement* over the land of the former.

Easement

An **easement** may be defined as *a privilege enjoyed by an owner of land in respect of the ownership of such land, in or over the land of his neighbour, whereby the latter is bound to submit to some definite use of his land* (not involving taking anything out of the land, such as cutting turf, digging gravel, etc.), *or to refrain from some definite use of it himself.*

It will be seen from this definition that an easement is a particular kind of extended right, which can be attached to a particular kind of property—namely, to land, or, as it is known in legal language, to **Real Property**.

It should also be noticed that an easement only relates to use and enjoyment, or, as it is called in legal phraseology, to "user" of the neighbour's land, and not to the taking of anything out of such land, *e.g.*, cutting turf, fishing, taking stones with which to repair a path, etc. Such rights of taking a profit out of the soil can be acquired, and are known as "*profits à prendre*," and will be dealt with later.

Dominant and servient owner.

The land or tenement whose owner enjoys the benefit of an easement is called the **dominant tenement,** and the neighbouring tenement, whose owner is obliged to allow, or to refrain from doing, something on his own land for the advantage of the other tenement, is called the **servient tenement,** the owners being called respectively the dominant and the servient owners.

Easement a right attaching only to ownership of land.

It must be clearly understood that an easement can only be enjoyed in respect of the ownership of land. A "*profit à prendre*" may exist "*in gross*," *i.e.*, apart from the ownership of land. For instance, one man may have a right to fish in another's lake, or to cut turf on another's land, without owning any land. The right is then called "a *profit à prendre* in gross"—that is, not depending on some other right.

An easement can never exist "in gross," although, of course, permission may be given by A. an owner of land, to B, a man who does not own land, to walk over A's land. This will not be a true easement, but only an extended personal right in gross, and cannot be assigned by B: whereas if B owned land and had a true easement to walk over A's land, B's right would be transferred with the land if he sold it, unless it was expressly excluded in the deed of conveyance.

Real and personal estate.

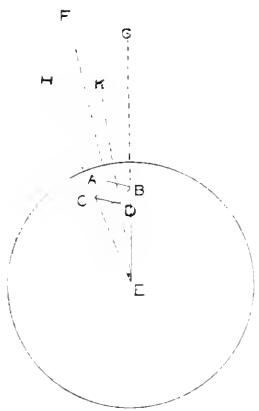
In order to clearly understand what an easement is, and the relation it bears to other extended rights of ownership, it is necessary to know something of what is meant by "real property," and afterwards to consider the various rights that can be attached to the ownership of land.

All things that it is possible to own are, according to English law, divided into two main headings:—(1) *Things real*, and (2) *things personal*, otherwise known as (1) "real property," "real estate" or "realty," and (2) "personal property" or "personalty."

The earth is approximately a sphere of solid matter whose diameter is about 8,000 miles. This sphere is enveloped in a gas called air, which extends to an unknown distance above the surface of the earth.

The rights of ownership of all movable things that exist on our portion of the earth are called personal property; even a cartload of earth is personalty, but the man who owns the space formerly occupied by the earth which is now in the cart, according to English law, owns real property.

When a man owns real property, he is usually described as owning a certain *area* of land (such as 500 acres, etc.). One of his rights of ownership is to dig out any earth at or under the surface of the area belonging to him, and assuming it possible, he may dig down to the centre of the earth, but no farther, because if he dug deeper he would be trespassing on the property of some person owning the surface on the other side of the earth. The ownership of a certain area of land, therefore, really means, the ownership of a certain amount of space occupied by the earth, such space being either conical or pyramidal in form according to the shape of the surface owned. Thus, supposing the accompanying sketch to represent the world, the



owner of the plot A B C D really owns the pyramid of earth whose apex is E (the centre of the world), and whose base is A B C D. He also owns the space occupied by the air above A B C D up to as great a height as it is possible to go in a balloon or airship, say to F G H K.

Real property, therefore, consists of the rights of ownership exercised over a certain cone or pyramid of the earth and of the air above, or, should the soil be removed, over the space formerly occupied by it. This space is indestructible, so that, assuming the earth to have a perpetual existence, we may say that real property is indestructible and perpetual. Even if an owner were to dig out all his earth, he would still own the space it formerly occupied, and, if he chose, could buy other earth and fill up the void.

The natural state of things, however, is for this cone or pyramid to consist of solid matter varying in composition according to the strata. The surface may be covered with water—*e.g.*, a pond or lake; but this will not affect the ownership of the land under the water, since in law a lake is considered as "land covered with water." Further, all things permanently attached to the soil, such as buildings and articles permanently fixed to buildings, are included in the term "real property."

While *land*, therefore, in its restricted sense, means soil, in its legal sense it includes not only the surface, but also everything existing in or permanently erected on the soil, the air above, and the water on it, and all things beneath the surface down to the centre of the earth. Hence, when a plot of "land" is bought, all things attached to the soil, and all minerals beneath it, are included in the purchase, whether mentioned in the conveyance or not. When, however, such things are severed from the land, they at once cease to be realty and become personalty.

Frequently the ownership of land is divided horizontally; for instance, in mining districts a

landowner may sell the surface land down to a certain limited depth, and may retain all the land below that level (or the "subjacent" land as it is called) for mining. Or a railway company may purchase subjacent land for the purpose of constructing a tunnel without buying the surface land. In such a case the surface land must be supported against subsidence.

Various Tenures of Land.

It would not be possible or advisable, in an elementary treatise on the subject of Easements, to explain fully the various ways in which land may be held, but it is essential to deal briefly with the different "tenures" or modes of holding real property.

Origin of tenure or fees.

The old Feudal System, which prevailed over the greater part of Europe in the Middle Ages, was established in this country by William the Conqueror. Under that system a "feud," or grant of land, was made by a feudal superior or lord, to a tenant in return for certain services, which consisted either in the payment of rent, or military or manual services, such as ploughing the lord's land. In addition to granting the land the lord was bound to protect the tenant. Since the lord in turn held his land as a tenant of the King in return for military services, there was only one person who had absolute ownership of the land, namely, the King, and in theory this system still exists at the present day. Everyone in possession of land "holds" it from the King, or from somebody else who in turn holds it from the King. A man who holds land direct from the King is

considered to have a better "status" or "estate" than one who has one or more superior owners between himself and the King.

Fee simple

The highest "estate" is that of a man who holds his land direct from the King, and without any restrictions as to the continuance of the property after his death. This is called an **Estate in fee simple** and is an "estate of inheritance," *i.e.*, one which goes to the heir of the owner if he dies without disposing of it. The holder of this estate is called the "tenant in fee" or the "freeholder," and it is the highest form of tenure known to the law. The freeholder can do whatever he pleases with his land during his lifetime, provided he does not thereby interfere with the rights of others, or break the law; and after his death he can leave it by Will to whomsoever he chooses. For all practical purposes he is the absolute owner, although legally he is a tenant of the King.

Fee tail.

Another estate of inheritance is that known as an **Estate in fee tail.** Here, too, the owner or "tenant in tail," as he is called, holds direct from the King, but he holds it subject to this restriction, that after his death the land *must* pass to the heirs of his body, *i.e.*, to his children, grandchildren, and so on, so long as his posterity endures; or the inheritance may be limited to some particular heirs of his body, *e.g.*, to his children by his first wife; or it may be limited to males or to females. It is then known as a "special" tail, and, should the special tail fail, the estate would revert to the donor (or reversioner), unless it had been provided in the grant, that on

the failure of the special tail the property should go to a third person (or remainderman). A tenant in tail in possession can "bar" the entail by deed and thus convert the estate into an estate in fee simple.

Tenancy for life

Property may also be granted to a person for his own life, or during the continuance of the life of another. This is known as an **Estate for life,** and the holder of it is called the "Tenant for life" or "Life tenant." It is a freehold estate, but *not* of inheritance; that is to say, the children or heirs of the tenant for life have no interest in the property.

Copyhold tenure.

A Copyhold estate is one forming part of a manor. Land is held under the lord of a manor by "copy" of the rolls of the court of the manor. Originally the land was held during the pleasure of the lord, and in theory the tenant (or copyholder) is a tenant-at-will, but in practice, owing to custom, the ownership of a copyholder is in most respects as absolute as that of a freeholder. Copyhold estates are always subject to the customs of the particular manor to which they belong, and especially with reference to the admittance of successive tenants, when certain payments either in money or cattle have to be made. The freehold of a copyhold estate belongs to the lord of the manor, but copyholds can be "enfranchised": that is, turned into freeholds, by the lord transferring the fee simple (or freehold) to the copyholder, the copyholder having now a right given to him by Act of Parliament to compel the lord to do so on payment of proper compensation.

Leasehold tenure.

When land is held under a lease (sometimes called a "demise") it is said to be leasehold.

A lease is a "chattel real"; that is, an interest in land which does not amount to a freehold, and it ranks as personalty. Any letting of land or houses for any period, however short, is, strictly speaking, a lease, although popularly, the term is applied only to a letting for more than three years, which must be by deed—that is, by a document which must be "signed, sealed and delivered." For tenancies not exceeding three years it is usual (though not necessary) to have a written agreement, which may be for a yearly, quarterly, monthly or weekly tenancy, or even for a tenancy at will. The person who conveys the property is called the landlord or "lessor," and the interest which he retains in the property is his "reversion"; the person to whom the property is let is called the tenant or "lessee." A lease is generally written in duplicate, one copy (the "lease") being signed by the lessor, the other part (the "counterpart") being signed by the lessee and kept by the lessor.

Other chattel interests in land.

It will be seen, therefore, that there may be several persons who have an "estate" or "property" in the same piece of land, although the fee simple or freehold, can only be in the freeholder or freeholders. For instance, suppose A, the owner of a piece of freehold land, grants a lease of that land to B at a fixed rent for 999 years. B then grants a building lease for 99 years to C at a fixed rent. C builds a house on the land and lets it to D on a lease or agreement. In this case there are four persons, each of whom has an estate in the same piece

of land, although the only person having "real estate" in the land is A. The estates of B, C and D are personal.

With the foregoing elementary remarks on real property the reader will have gathered some idea of what are, first, the "*ordinary*" rights attaching to real property, and secondly, how "*extended*" rights can be obtained. **The Law of Easements deals with certain extended rights which can be attached to the ownership of land.**

SUMMARY OF CHAPTER I.

1.—The "Property" in anything possessed consists of the *Rights* of ownership attached thereto, subject to the *Obligations* attached thereto.

2.—According to the English law a person may "do what he likes with his own," provided he does not thereby interfere with similar rights of other parties.

3.—Rights may be—

(*a*) Personal, *i.e.*, "in gross" or irrespective of the ownership of anything.

(*b*) Appurtenant, *i.e.*, belonging to the ownership of something.

4.—An Easement is a right appurtenant to the ownership of land, and may be defined as "a privilege enjoyed by an owner of land in or over the land of his neighbour, whereby the latter is bound to submit to some definite use of his land (not involving a participation in the profit of the soil), or to refrain from some definite use of it himself."

5.—An Easement cannot exist in gross.

6.—Freehold is the highest estate in land known to the English law.

7.—An Easement is a *partial* property in the land of another, enjoyed by one owner of land, whereby the other owner's rights are curtailed.

8.—Real Estate may be—

(*a*) Land held in Fee Simple.
(*b*) Land held in Fee Tail.
(*c*) Land held for Life.
(*d*) Land held from the Lord of a Manor (Copyhold).

9.—A Leasehold Estate is a right to occupy land for a limited term. This form of tenure is usually subject to considerable obligations to the owner of the Real Estate, including that of the payment of a rent. Any easement which may be acquired by a leaseholder is acquired *on behalf of the owner of the Real Estate* (*i.e.*, the Freeholder).

CHAPTER II.

Natural Rights, Profits à prendre, Licenses, Customary Rights, Public Rights-of-way, and Rights of Common, as distinguished from Easements.

Natural rights.

Certain rights are attached by law to the ownership of land, in order that the owner may enjoy his property to its full extent without interference from his neighbours. These rights are called **"Natural Rights,"** and are given by law to every owner of land. They are not specially acquired by him from the previous owner or from anyone else, but consist of rights which owners of land have from time immemorial been accustomed to enjoy—namely, to have the benefit of certain things which nature has provided for the good of mankind. A landowner has a natural right to the light and air which is perpendicularly over his land; but a right to receive light and air in a lateral direction would, if acquired, be an easement: he has a natural right to the necessary support of his land by that of his neighbour; but a right to the support of buildings by a neighbour's land would, if acquired, be an easement: he has a natural right (1) to the uninterrupted flow and use of water running in a defined and natural stream through his land, provided he does not use an excessive quantity or interfere with its flow to the detriment of another

owner lower down the stream; and (2) that all water passing over his land, whether in a defined natural stream or trickling over or percolating through his land in an undefined course, shall continue to flow in its natural pure condition: but a right to interfere with the natural course of the stream or to pollute the water to the detriment of the interest of another owner of land would, if acquired, be an easement.

It will be noticed that in some respects Natural Rights resemble Easements, and some writers have described them as "Natural Easements." The chief difference is that, whereas easements are privileges enjoyed by one landowner over the land of his neighbour, *acquired* by the latter's consent or otherwise, natural rights are *given by law* to every owner of land. The above examples of Natural rights will be further considered in subsequent chapters, in which the acquisition of easements of light, air, support, and water, will be dealt with.

Natural rights cannot be extinguished.

Since natural rights are inseparable from land they can never be extinguished. They may, however, be suspended, as, for instance, by an owner granting an easement which has the effect of curtailing or suspending his natural rights; but should that easement be extinguished the natural rights will at once revive. For example, if an owner of land, through which a natural and defined stream passes, has acquired an easement to interfere with the flow of water for purposes of irrigation, to the detriment of his neighbour lower down the stream, the latter's natural right to the uninterrupted flow of water would be curtailed. But supposing the land

was afterwards built on, so that no water was required for irrigation, the easement would then cease, and the neighbour's natural right to the uninterrupted flow of water would be revived.

Although the distinction between natural rights and easements is of no great *practical* importance, it is necessary to point out the difference between an easement and a *profit à prendre*, a license, custom and customary rights, public rights of way and rights of common.

Profits à prendre.

A profit à prendre, as the expression implies, is a right "to take" something out of the land of the servient owner for the use or benefit of the dominant owner—*e.g.*, a right to feed one's cattle, to cut turf, to dig for sand, or to fish, on another's land; whereas an easement is merely a privilege to be exercised over a neighbour's land without any participation in the profit of it. A *profit à prendre* is acquired in the same manner as an easement—*i.e.*, either by grant, or by long usage, as will be explained later, but cannot be claimed by custom, except in the case of manorial custom. For example, copyholders may, in certain manors, have a customary right to take shingle from land belonging to the lord of the manor. As before stated, a *profit à prendre* may either be attached to the ownership of land, or it may be "in gross"—*i.e.* a personal right.

Right to draw water not a *profit à prendre*, but an easement.

It may here be noted that a right to enter land and draw and take away water from a well, is not a *profit à prendre*, but an easement, the reason for this being that water is not part of the soil like sand or clay, nor the produce of the soil like grass or trees; neither does it belong to the owner of the land until he has appropriated it by placing it in a cistern or some vessel for his own use.

Licenses.

A license is a permission or authority to do something which would otherwise be inoperative, wrongful or illegal. It may be either in writing or verbal, and is a personal privilege, quite independent of ownership of land, which one person obtains from the owner or occupier of land, to do something on that land either occasionally, or for a definite length of time.

To show the difference between an easement and a license, suppose A sells a portion of his land to B, and at the same time in the conveyance grants to B (the purchaser) and his heirs, etc., a right to walk over the land which A has retained, in order to get to a river, this would be a grant of a right of way attaching to the ownership of the land sold. It would be an easement, and would be assignable by B if he subsequently sold the land, and any one who bought A's remaining land would buy it subject to B's right of way over it.

But suppose A agrees, either verbally or in writing, to allow a builder C and his workmen to pass over his land for three months for the purpose of bringing bricks from a wharf on the river, for building A's new house; this will be a license which C could not assign, and which would not be binding on anyone who bought A's land even before the three months had expired. It is merely an agreement between A and C *as persons* and not *as owners of land*. If A sells his land to D, D is not bound by the agreement. If C sells his business to E, E cannot claim the right, as it was purely a *personal* one.

The grant of a license does not as a rule confer an interest in land, consequently any verbal or

written license which is not under seal (or "parol" licenses, as they are called) can at any moment be revoked by the grantor of the license. For instance, where tickets were sold at £1 1s. each to admit to a racecourse to witness some races, and a ticket holder was requested to leave while the races were in progress. The ticket holder refused to do so, and was compelled to leave by order of one of the stewards of the racecourse without the return of the money paid for the ticket. It was held that a right to come and remain for a certain time on the land of another can be granted only by deed: and a parol license to do so, though money be paid for it, is revocable at any time and without paying back the money.[1] In the same way a license to enter a theatre has been held to be determined by an assignment of the theatre.

Although a mere license is revocable at the will of the licensor, a reasonable time must be allowed to the licensee to remove himself and his property from the premises. When the effect of a license is to couple to it a grant of an interest of such a nature as can lawfully be made by word of mouth, or in writing not under seal, the license will be as irrevocable as if it had been made by deed—*i.e.*, under seal. For instance, A grants to B a license to hunt on his land and take away the deer when killed. This is a license to come on A's land and hunt, but, as it is coupled with a grant of the deer, the license would not be revocable until B had been allowed to hunt and take the deer for a reasonable period.

[1] *Wood* v. *Leadbitter*, 13 M. & W. 838.

Again, if A by license authorises B to dig for tin on A's land for a period of twenty-one years, and to dispose of the tin obtained, such license will include a grant of an interest in the ore which may be found, and the license is, therefore, irrevocable.[1]

Another case where a license may be irrevocable is, when the licensee is allowed to do something on his own land which will have the effect of abridging or extinguishing an easement hitherto enjoyed by the grantor of the license (the dominant owner) over the land of the licensee (the servient owner). For instance, A, by license of B, erected a skylight over A's own area, which had the effect of lessening the amount of light and air to which B had an easement, which light and air had hitherto come to a window in B's house. The Court held that as the skylight had been erected at A's expense and by B's consent, B could not revoke the license, at least not without tendering A the expenses to which he had been put in consequence of it.[2]

Where, however, there is a parol license coupled with a parol grant, or rather a pretended grant, of something which is only capable of being granted by deed, then, since the grant to which the license is coupled is invalid, the license is revocable. For instance, if A by parol license allows B to enter his land and divert a stream so as to flow on to B's land. In this case there would be no valid grant of right to the water, as it would be an attempt to grant an

[1] *Doe* v. *Wood*, 2 B. & Ald. 738.

[2] *Winter* v. *Brockwell*, 8 East 309.

easement by parol, and since easements can only legally be granted by deed, the license would be revocable.

Customs and customary rights differ from easements, inasmuch as they are not attached to *any particular individual* in respect of his land. Customary rights.

Custom may be defined as an unwritten law established by long usage and the consent of our ancestors, and is the basis on which our Common Law is founded. Particular or local custom is a usage attached to a certain locality, and a customary right is one which belongs to no individual in particular, but may be enjoyed by anyone who, for the time being, inhabits the locality to which the custom is attached.

The requisites of a valid particular custom are as follows:—It must have been used from time immemorial: it must have been continued; it must be peaceable, reasonable, and certain; and must not be opposed to, or inconsistent with, any other custom.

Many customs partake of the character of easements, such as a custom for the inhabitants of a parish to play lawful and reasonable games on a piece of land; a custom for the inhabitants of a town to walk over certain land to get to a church or market; a custom for traders to erect booths on the waste of a manor at the time of fairs; or for fishermen to dry their nets on land belonging to the manor. As, however, the existence and validity of these rights generally depend upon some local custom, excluding the operation of the ordinary rules of law, and as they are sometimes entirely independent of any express or implied agreement

between the parties, they stand upon a different footing to easements, and are not governed by the law of easements.

Public rights of way.

Public Rights of Way, though resembling easements, differ from them in that they are privileges enjoyed by the community at large, to use the highway (and this term includes navigable rivers), or a path for the purpose of going from one place to another. The right is not attached to the ownership of land, nor to any particular individual. The manner in which public rights of way are acquired will be dealt with in a subsequent chapter.

Rights of Common.

A Right of Common is a right enjoyed by an individual, to take a profit out of lands not belonging to him, in common with the owner of the land, and other persons. The possessors of this right are called "commoners," and the land over which the right is enjoyed is called "a common." The right cannot, except in the case of copyholders, be claimed by custom, but only by grant or by *prescription*, that is, by a personal usage for a considerable time, as will be explained later. A right of common differs from an easement, since it is a right to a profit in another's land, and is similar to a *profit à prendre*, except that the right is enjoyed in common with others instead of by an individual alone. There are four principal rights of common: (1) *Common of pasture*, the right of feeding one's cattle on another's land; (2) *Common of turbary*, the right to cut turf for fuel; (3) *Common of piscary*, the right to fish in water belonging to another; (4) *Common of estovers* or *botes*, a right to take wood in reasonable quantities from another's estate for house purposes or repairs. This right is called "house-bote"

when the wood is used to repair a house, "fire-bote" when used to burn in the house, "plough-bote" and "cart-bote" when used for making and repairing instruments of husbandry, and "hedge-bote" when used for repairing hedges or fences.

Rights of common are said to be "*appendant*," that is, when enjoyed by all the tenants of a manor, and in such case must always be acquired by prescription (*i.e.*, long period of user): "*appurtenant*," that is, attached to the ownership of some particular land or house, and which can be at any time created by grant: "*in gross*," that is, not connected with the ownership of land but belonging to individuals.

A common of pasture may in addition be "*because of vicinage*" (or neighbourhood), which arises when the tenants of two adjoining manors have allowed their cattle to range indiscriminately over both of the manor wastes.

SUMMARY OF CHAPTER II.

1.—NATURAL RIGHTS are those rights given by law to every owner of land. No one may interfere with the natural rights of another, unless he has acquired an easement to do so. An easement is sometimes defined as the abridgment of a natural right.

2.—A natural right is never extinguished, but may be suspended during the continuance of an easement adverse to it. Should such easement cease or be abandoned, the natural right will revive.

3.—A PROFIT À PRENDRE is a right acquired by one person to go on to the land of another and to

take something therefrom, such as turf, shingle, sand, fish, etc. Such a right may exist "in gross." A right to take water is *not* a *profit à prendre*, but is an easement.

4. A LICENSE is a permission given to a person, irrespective of the ownership of land, to enter the land of the grantor of the license, for some particular purpose. It is only a *personal* right, and does not pass to the successors of the licensee; neither are the successors of the grantor of the license bound by it, unless, in either case, so provided in the license. A parol license can be revoked by the grantor; but if there is coupled to it the grant of some interest which can lawfully be made verbally, or by writing not under seal, the license is irrevocable.

5.—CUSTOMARY RIGHTS are those which individuals residing in a certain district have from time immemorial been in the habit of enjoying over certain land. The essence of the difference between a customary right and a license is that in the former case it is the *land* which is subject to the personal rights of a part of the community, whereas in the case of a license it is the *person* who has a right over a certain piece of land.

6. PUBLIC RIGHTS OF WAY are those enjoyed by the whole community (as opposed to the inhabitants of any particular district) to the use of public highways, including navigable rivers.

7.—A RIGHT OF COMMON is a right similar to a *profit à prendre*, but enjoyed over land in common with others, including the owner of the land. The principal rights of common are:—

(*a*) Common of Pasture.
(*b*) Common of Turbary.
(*c*) Common of Piscary.
(*d*) Common of Estovers.

Rights of common may be "appendant," "appurtenant," or "in gross."

CHAPTER III.

The Acquisition of Easements by Express Grant or Reservation.

Easements may be acquired— Methods of acquiring easements.

1. By Grant—
   - (*a*) Express (*i.e.*, by definite agreement between the parties).
   - (*b*) Implied (*i.e.*, by construction of law, which must reasonably follow from some other agreement between the parties).
2. By Reservation—
   - (*a*) Express
   - (*b*) Implied

   } both as above.
3. By Prescription—
   - (*a*) At Common Law.
   - (*b*) By Statute (*i.e.*, by Act of Parliament).

This chapter deals only with the acquisition of Easements by Express Grant and Express Reservation.

A Grant is a formal agreement in writing, whereby property is transferred from one person to another. The maker of the grant, who transfers or alienates the property, is called "the grantor," and the person to whom the property is transferred, is called "the grantee." Grant.

A grant is said to be "express" when it specifically names the property or right granted. Many grants

do not specifically name all the rights which are intended to be transferred. Such rights, as will be seen in the next chapter, are, nevertheless, considered in law to be included in the grant, and are said to be transferred by "implied" grant.

Reservation.

A Reservation is a retention by a grantor of a right which would otherwise pass to a grantee. If specifically named in a grant it is called an *express* reservation; and if not mentioned therein, but of such a nature that the parties must have intended the right to remain the property of the grantor, it is called an *implied* reservation.

There is a legal maxim that "A grantor may not derogate from his own grant." This means that he must not, by any subsequent act of his own, prejudice or lessen the rights transferred to the grantee by such grant.

Example of express grant.

An illustration will perhaps show more clearly the difference between a grant and a reservation. Suppose there are two tenements, "Whiteacre" and "Blackacre," both owned by A. Blackacre is sold by A to B, and one of the conditions of the purchase is that B shall have a right to walk over Whiteacre to get to the railway station, B thereby saving, say, half a mile's walk. In the deed of conveyance A will grant to B, as owner of Blackacre, a right of way over Whiteacre for that purpose. B will then acquire the easement of a right of way over Whiteacre by express grant.

Example of express reservation.

But suppose in the same illustration that A, instead of selling Blackacre, had sold Whiteacre to B, and A himself wished to continue to use the "short cut" over Whiteacre to the railway station, he could make it a condition of sale that this right of

way should be reserved to him in the conveyance as owner of Blackacre, and A would then possess an easement over B's property (Whiteacre) which he would have acquired by express reservation.

It will be seen from the above that it makes no real difference whether an easement is obtained by grant, or reservation, since the result is the same. It is as binding on the servient owner as on the dominant owner, since the reservation has the same effect as if B, the purchaser of Whiteacre, had granted to A an easement over Whiteacre by a separate and express grant.

The rule that a man may not derogate from his own grant is also applicable to the case where a grantor of land, at the time of the grant, owned adjoining lands which he had let on lease. Upon the determination in any way of the leasehold interest, the grantor and those claiming under him (*e.g.*, subsequent tenants, or purchasers of the adjoining lands) are debarred from doing anything on the adjoining land in derogation of the original grant. The rule is not founded upon any implied covenant, but is a legal and not an equitable rule, and binds persons claiming through the grantor, even though they are *bonâ fide* purchasers without notice of the grant.[1]

It is essential that a conveyance of land from one man to another shall be evidenced in some formal and distinctive manner, and the law requires it to be either by deed or by will. **A Deed** is a document drawn up in a formal manner, and executed by the parties to it in a formal manner, each one saying,

[1] *Cable* v. *Bryant*, (1908) 1 Ch. 259.

"I deliver this as my act and deed," and accompanied by each party signing the document and affixing his seal in the presence of a witness, who also signs the document. **A Will** is also a document of a very important character, since it is "the legal declaration of a man's intentions, which he wills to be performed after his death," and must be executed in a formal manner in the presence of two witnesses.

Easements can only be created by deed

Since an easement is always attached to, and can only be held in conjunction with, land, it follows that the only way in which one can be granted is by deed or by Will. To this rule there is one exception, namely, that an easement may be acquired under the provisions of a special Act of Parliament, since Parliament has power to grant any right, as, for instance, where a railway company is granted rights of way, etc., by the Act which authorises the construction of the railway.

or by Act of Parliament.

It should here be noted that if an owner had merely agreed to grant a purchaser an easement, or had attempted to grant one by some document other than a deed or will (*e.g.*, by a letter), and the purchaser had paid the owner for such easement, the Courts would, if the purchaser brought an action to have the easement properly vested in him, compel the grantor to do so; and even if the purchaser did not bring an action, they would compel the grantor to allow the purchaser to exercise the easement, and his right to do so would be called an equitable right. If, however, in this case the servient tenement was sold to a person who knew nothing of the existence of any easement over his purchase, the easement would cease, because it had never been legally or formally granted.

It is far more usual for easements to be created by deed than by will, and although no particular form of words is necessary it is usual to find a more or less stereotyped form used. The following example is given of that portion of a grant which actually conveys a right of way in perpetuity for all purposes. The preliminary part dealing with the relative positions of the parties, etc., has been omitted:—

Example of express grant.

"NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the sum of £50 paid by the said John Jones to the said Peter Smith (the receipt whereof the said Peter Smith hereby acknowledges) the said Peter Smith hereby as beneficial owner grants unto the said John Jones his heirs and assigns Full and free right and liberty for him and them his and their tenants servants visitors and licensees in common with all others having the like right at all times hereafter by day or night with or without horses cattle or other animals carts carriages or other vehicles of any description for all purposes connected with the use and enjoyment of the said Anytown Grange for whatever purpose the said land may be from time to time lawfully used and enjoyed to pass and repass along the said private road for the purpose of going from the said High road from Reigate to Sutton to the said lane called Shoe Lane or *vice versâ*. To hold the said easement or right of way hereby granted unto the said John Jones his heirs and assigns as appurtenant to the said Anytown Grange and every part thereof. IN WITNESS whereof the said Peter Smith has set his hand and seal the day and year first above written.

Signed, sealed and delivered by the said Peter Smith in the presence of } PETER SMITH. (Seal.)

JOHN BROWN,
Grove Cottage,
Anytown.
Gardener."

Express Grant of existing Easements.

So far we have only dealt with the grant of an easement which is being newly created by the grant, and not with those which were already attached to the land at the time of its being sold, having been acquired by the vendor or some previous owner by grant or otherwise. For instance, in the first example given in this chapter, suppose B, after buying Blackacre, together with the right of way over Whiteacre, should sell Blackacre to C; C will of course wish for the same right of way over Whiteacre that B has enjoyed, and he would be entitled to it; and on B conveying Blackacre to C it will not be necessary to set out in the conveyance the grant of the easement over Whiteacre, since, by the Conveyancing Act of 1881 (which came into force January 1st, 1882) all rights, such as easements, etc., enjoyed by the vendor of land, pass with the land to the purchaser, without being specially mentioned, on all transfers of property after that date. Before the Act came into force it was usual not only to convey the land, but also to specifically set out all the easements and other rights to be enjoyed with it. If, however, the word "appurtenances" was used, it was sufficient to include easements, although the word "easements" was omitted.

Of course, it is still possible for a vendor to expressly exclude the transfer of easements in the conveyance if he wishes to do so; but if no such reservation is made, the purchaser will be entitled to enjoy all easements previously enjoyed by the vendor.

SUMMARY OF CHAPTER III.

1.—Easements may be acquired in three ways—
(1) By express grant or reservation.
(2) By implied grant or reservation.
(3) By prescription.

2.—A GRANT is a formal agreement in writing whereby property is transferred.

3.—A RESERVATION is a retention by a grantor of a right which would otherwise pass to the grantee.

4.—An easement can only be created by Deed (*i.e.*, a written document under seal), or by Will, or by Act of Parliament.

CHAPTER IV.

The Acquisition of Easements by Implied Grant and Implied Reservation.

Implied grant and reservation.

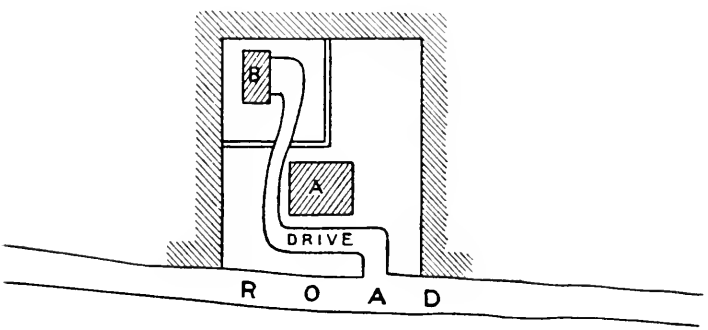
We now deal with one of the most difficult points in connection with the law of easements: that is to say, how it is that an easement, although not in existence when the land is conveyed, nor yet expressly created by grant in the conveyance, may nevertheless be *impliedly created* in favour of the person to whom the land is transferred, or, on the other hand, may be *impliedly reserved* by the grantor of the land.

Although there are many easements which will be impliedly granted in favour of the purchaser of land, there are few, except "easements of necessity," which can be impliedly reserved. The reason for this is that when one man grants land to another, without expressly reserving easements or rights over it in the deed, he is presumed to have granted the land absolutely, and without restrictions or limitation, so that the grantee may enjoy the land to its full extent, and without interference. Were it otherwise it would be a case of a grantor derogating from his own grant, which, as explained in the last chapter, is contrary to law. For instance, if A sells B a house having windows overlooking other land belonging to A, B will have a right to a reasonable quantity of light to those windows, by implied grant, and A must not build in such a manner as to

obstruct that light. But suppose A, instead of selling the house, sold the land adjoining his house, without expressly reserving a right of light to the windows which overlooked that land, and the purchaser built a wall which completely obstructed the light coming to the windows. Here A would have no right to the light by implied reservation, as he sold the land free from restriction, and the purchaser would only be exercising his ordinary right to build on any portion of the land. In other words, A cannot derogate from his own grant.

Easements by implied grant only arise when the owner of land divides the ownership of it, either by selling a portion only, or by transferring the whole of it to two or more persons. It must, however, be remembered that when a man is unable, owing to covenants or otherwise, to make an express grant, he cannot grant an easement by implied grant.

A man cannot have an easement over his own land; it can only be in or over the land of another. Of course, he may do what he likes on his own land. For instance, suppose a man owns a house A and stables B, on one piece of land, as shown on the accompanying sketch, and has been accustomed to



walk from the stables B to the house A, and to the road. This would not be an easement, but merely an ordinary right of property, viz., to walk over his own land. But suppose he divides the land, and sells the stables to a carrier, and still keeps the house; in this case the carrier would, by operation of law, have an easement, or right of way, by implied grant, over the vendor's land; and since the only other way of reaching the road would be by going over the land of a stranger, it would be an "easement (or way) of necessity." Such an easement would, however, cease when the absolute necessity ceased. For instance, should the carrier in the above example buy some of the surrounding land by which he could reach the road, it would be no longer necessary for him to come through the vendor's land, and the easement would cease.

Example of easement of necessity by implied grant.

The above example would also show how an easement of necessity can arise by implied reservation. Suppose the owner had sold the house, and retained the stables for his own use. He would then have, by implied reservation, a way of necessity over the land of the purchaser of the house, in order to reach the road; and in either case, on any subsequent change of ownership of either tenement, the easement, by implied grant or reservation, will continue as long as the necessity lasts, and the owners will enjoy the benefit of the easement, or be bound by it, respectively.

Implied reservation.

Again, an owner of land might sell a plot of land which was surrounded on all sides by his own land. Here the plot sold would be useless to the purchaser unless he had a right of access to it over the remaining land of the vendor, and the purchaser is

Land surrounded by other land of vendor or purchaser.

entitled to this right by implied grant. Or, if instead of selling the inside plot the vendor had kept it and sold the surrounding land so as to be shut in on all sides by the land of the purchaser, the law would impliedly reserve to the vendor a right of way over the land he had sold, so as to get to the plot he had retained. In either of these examples the person entitled to the right of way of necessity may take the way which is most convenient to him, but the way which he decides upon, cannot be altered afterwards. Needless to say no grant of a right of way can be implied over the land of a stranger.

Easements of necessity are not confined to rights of way, but may be any easements without which the severed portions of the land sold could not be used at all, or only by going to unreasonable trouble or expense. For instance, if a man has two properties, Blackacre and Whiteacre, and Blackacre is supplied with water by a pipe passing through Whiteacre, the water being necessary to the enjoyment of Blackacre; on the sale of Blackacre the right to use the water will pass with the land, and the vendor, or any subsequent owner of Whiteacre, will not be allowed to stop the flow of water through the pipe.[1]

In a similar manner, if a man owned two properties, Blackacre and Whiteacre, through both of which a drain pipe passed, and he sold Whiteacre; his right to use the drain running under Whiteacre would continue by implied reservation, if it was necessary to the full enjoyment of Blackacre; and any subsequent owner of Blackacre or Whiteacre

[1] *Watts* v. *Kelson*, 40 L.J. Ch. 126.

would respectively have the benefit of, or purchase subject to, the easement, as long as the necessity lasted.[1]

There have been numerous cases on the question of what easements will be impliedly granted on the severance of a tenement, and the decisions are somewhat conflicting. The law depends to a greater extent than usual on the varying circumstances surrounding each particular case, but, as appears from these cases, impliedly grants to the purchaser all easements of necessity, as before explained, and also all continuous and apparent *quasi*-easements.

Quasi-easements.

Quasi-easements are certain rights which a man exercises over his own property for his own convenience, which result in making one portion of his land dependent on another portion, in such a way that if the land had belonged to two owners instead of one, the owner of the part enjoying the convenience or privilege, would have possessed an easement over the other part. As long as the property remains in one ownership, this right or convenience is not an easement at all, but only the ordinary right of the owner to use his land in any manner he chooses, since, it will be remembered, a man cannot have an easement over his own land. If, however, the convenience is **apparent,** that is, one which is evident from inspection of the tenement (*e.g.*, a right of way), and **continuous,** that is, one which continues to be enjoyed without the intervention of man (*e.g.*, the access of light), it is known as a **quasi-easement;** and if the owner sells or transfers that portion of the land, which, during

Quasi-easements become true easements.

[1] *Pyer* v. *Carter*, 26 L.J. Exch. 258.

unity of possession, enjoyed the apparent and continuous convenience or quasi-easement, the latter will, it seems, under Section 6 of the Conveyancing Act, 1881, become a true easement, to which the purchaser will be entitled, by implied grant, if it is necessary to the reasonable enjoyment of the property which is sold, and unless it is expressly excluded in the conveyance.

Discontinuous easements do not arise by implied grant.

It should be noticed that a **discontinuous** easement, that is, one which can only be enjoyed by the dominant owner doing some fresh act each time the right is exercised, will not pass by implied grant, although it may be "apparent" (*e.g.*, a right to draw water from a pump, which is a discontinuous easement, as it can only be enjoyed by the act of the dominant owner pumping the water). The easement claimed must be both continuous and apparent.

There is one instance, however, in which a grant of a right of way over a defined and made path was held to be implied, although it is, strictly speaking, a discontinuous and apparent easement, since the privilege can only be enjoyed by the act of walking over the servient tenement. An owner of three houses in a row, sold the two end houses "together with the rights, easements and appurtenances thereto belonging." At the back of the houses was a defined and made path from a road, clearly formed for the use of the occupiers of the two end houses only; the occupiers claimed a right to use the path by implied grant, and the Court held that they were entitled to do so, since the path had evidently been made for the use of those houses, and for them only.[1]

[1] *Brown* v. *Alabaster*, 57 L.J. Ch. 255.

But, as was pointed out before, the circumstances of each case have a very great influence on the question of implied grants, and it would not be safe to assume that in every case a right of way would be implied under similar circumstances; and, of course, it is possible for the grantor to prevent the acquisition of easements by implied grant, by specifically reserving them or preventing their acquisition, by clauses in the deed of conveyance.

Or the grantor may, on severance of his property, do something which is inconsistent with his having granted, as appurtenant to the portion sold, a convenience hitherto enjoyed by him over the land which he keeps, and the result will be that if the convenience is only a convenience, and not a necessity, it will not be conveyed to the purchaser by implied grant. For instance, suppose during unity of possession water flows through a pipe from one portion of an estate A to another portion B. The water is *not* necessary to the enjoyment of portion B, but only a convenience; the owner cuts off the supply to B and subsequently sells that portion. The purchaser of B will have no implied right to have the flow of water continued, since it is not necessary to the enjoyment of his land, and the act of the vendor in cutting off the supply is inconsistent with his having granted the right.

But there can be no doubt that in the following cases of continuous and apparent conveniences the grant of an easement will be implied on severance, and subsequent owners will hold the land subject to the easement in each case:—

(1) Where an owner of a house and garden sold the house but retained the garden.

there would be an implied grant of a right of light to the windows of the house which overlooked the garden.

(2) Where a man owns a house and land, and sells the house, he impliedly grants an easement of support to the house, by the land which he retains.

(3) Where a man sells land expressly for building purposes, he impliedly grants a right to support, by the land which he retains, for such buildings as it is proposed to erect.

(4) If a man builds two semi-detached houses, and sells one, he impliedly grants a right of support to the house sold, by the house retained; and *vice versâ* impliedly reserves for the house retained, a right of support by the house sold, this being an easement of necessity.

(5) Where a common drain runs through two tenements, and the owner sells one of them, the purchaser will by implied grant be entitled to use the drain in the same way in which it was used before severance.

(6) Where an owner sold a portion of his estate to a firm for the purpose of erecting chemical works, he could not afterwards sue them for polluting the air passing over his remaining land, as, knowing the object for which the land was to be used, he had impliedly granted them a right to do so.

(7) Where an owner grants to another person the mines and minerals under his land, and the right to work the same, there is impliedly reserved a right of support; that is to say, a right to prevent the mine owner from so working the mine as to cause the surface of the land to subside. If, however, it is quite impossible for the latter to obtain the minerals without doing so, the right of support would not be reserved, as it would be a case of the owner of the surface land derogating from his grant (viz., the right to take the minerals), and this is illegal.

SUMMARY OF CHAPTER IV.

1. Many easements arise by implied grant in favour of the purchaser; few are impliedly reserved by the vendor.
2. In the absence of restrictive covenants, the purchaser of land may enjoy it to its full extent. The vendor should protect himself in the conveyance, as he must not derogate from his grant.
3. EASEMENTS OF NECESSITY are those without which the land sold could not be used at all, or only by going to unreasonable trouble or expense.
4. QUASI-EASEMENTS are rights exercised by a man over his own land, which cause one portion of it to enjoy some apparent and continuous privilege or convenience over another portion in such a way that, had the land belonged to different owners, the owner of the portion which enjoyed the privilege or convenience would have had an easement over the other portion. On severance *quasi*-easements become true easements.
5. DISCONTINUOUS EASEMENTS will not generally arise by implied grant.

CHAPTER V.

The Acquisition of Easements by Prescription.

We now arrive at a very important and interesting part of the study of the Law of Easements, namely, how they may be acquired by prescription. Prescription

Prescription is the gaining of a right or title by lapse of time, or, in other words, by long user.

By the word "user" is meant the use or enjoyment of property, or of the right which is claimed.

Prescription is based on the presumption that if a man has enjoyed a privilege over another man's land for a long period of years, he is supposed to have a just right, without which he would not have been allowed to continue the enjoyment, as no one would be likely to allow another to enjoy an easement over his land if he could prevent it. The word is derived from the Latin *præscribo*—"to write before," which suggests the existence of a written grant at some previous time.

Easements may be acquired by prescription in two ways:—

(*a*) By prescription at Common Law.

(*b*) By prescription by Statute (*i.e.*, under the Prescription Act, 1832).

PRESCRIPTION AT COMMON LAW.

By the **Common Law** is meant the ancient law of the country, as deduced from custom, and interpreted by the Judges. It includes those principles, Common Law and Statute Law.

usages and rules of action applicable to the government and security of person and property, which do not rest upon any express or positive declaration of the will of the Legislature; that is to say, which are not set out in the different Acts of Parliament.

For instance, if a man is run over by a carriage owing to the driver's negligence, he has a Common Law right to bring an action against the driver for damages for personal injuries. There is no Statute expressly dealing with negligence of this kind, but the Common Law holds a man liable, if by reason of his negligence, he injures another.

We may, for the purpose of this subject, consider the law to be divided into two branches—

(*a*) Common Law as described above.

(*b*) Statute Law (*i.e.*, that laid down by Acts of Parliament).

Prescription at Common Law.

Formerly, easements could only be acquired by Prescription at Common Law. The person claiming the easement had to show that the right claimed had been enjoyed by him and his predecessors from time immemorial. This did not mean that the claimant had to prove actual immemorial enjoyment, which of course would be impossible; but that anyone who wished to defeat the claim was able to do so if he could prove when the privilege claimed was first enjoyed, or that it was non-existent at a certain date *within* the memory of man, and had, therefore, adopting the phrase used in old law books, not been enjoyed "from time whereof the memory of man runneth not to the contrary," which time was essential to the acquisition of rights by prescription.

This long and uncertain period was found inconvenient, and consequently a Statute was passed fixing the time to which legal memory extended back, as the first year of the reign of Richard I. (A.D. 1189), so that if a claimant proved that he had enjoyed the right uninterruptedly since 1189, or rather, unless any person opposing the right could prove its commencement since that date, it was held to have been enjoyed from time immemorial.

Fiction of lost grant.

This necessarily had no finality in its effect, for as time went on, the year 1189 became practically antiquity. Therefore, the Courts adopted the practice of assuming immemorial user if it could be shown that the privilege claimed had been enjoyed for a reasonable length of time without interruption; and this practice continues to the present time if an easement is claimed by prescription at Common Law. If uninterrupted enjoyment is proved for twenty years, the Courts will presume that the privilege claimed had a lawful origin, and that it originated in a grant made by the predecessors of the servient owner to those of the dominant owner; and since the grant cannot be produced, having really never existed, the Courts will presume that the grant has been made and has been accidentally lost.

The reason why this legal fiction of the presumption of a lost grant is necessary is that formerly an easement could only be acquired by grant, and the fiction did away with the difficulty of proof of immemorial user.

Modes of defeating fiction of lost grant.

In order to establish a right to an easement by prescription at Common Law it is necessary that an action be brought by either the would-be dominant, or by the servient, owner. Since the fiction of the

lost grant is a presumption only, the servient owner can defeat the claim if he can prove—

(1) that the easement claimed was first enjoyed at any time within legal memory; that is, since the year 1189;

(2) that the presumed grant could never have been legally made;

(3) that if an easement had ever been lawfully acquired it had since been extinguished owing to both the tenements having at some time become the property of one man, or had been extinguished in some other manner;

(4) that the claim is in conflict with an Act of Parliament or with another prescriptive right;

(5) that it is in conflict with the express limitations of some grant or agreement between himself (the servient owner) and the claimant, or their predecessors;

(6) that he or his predecessors were not aware, and had not the means of finding out, that the easement was being enjoyed;

(7) that he was incapable of resisting the enjoyment of the easement by reasonable means;

(8) that the enjoyment of the easement had not been continuous or peaceable, although an interruption of comparatively short duration will not destroy the right.

It will readily be seen from this how difficult it was to acquire an easement by prescription at Common Law, since proof of commencement of the

user at any time after the year 1189 at once defeated the claim, and in addition to this there were all the other foregoing objections which would defeat the claim: and, further, it was still necessary to induce a jury to find that there had originally been a grant which had been lost, although everyone knew that probably no such grant had ever existed.

To do away with this fiction, and to remove the injustice which frequently resulted from a claim being so easily defeated, the Prescription Act, 1832, was passed; but in cases where the Act does not apply, easements may still be acquired at Common Law in the manner above described. Even in cases where the Act does apply, the claimant still has the option of claiming his right by prescription at Common Law instead of under the Act.

Prescriptive rights attach to persons as owners; Customary rights attach to places.

Before considering the acquisition of easements by Statute it may here be pointed out that, although many rights may be acquired by **prescription** at Common Law, there is a difference between those which can be so acquired and those which can be acquired by **custom,** although immemorial usage is essential in both cases. As previously explained (Chapter II., p. 23) custom is properly a local, **impersonal** usage annexed to certain places or to a body of persons, whereas prescription is simply **personal,** as, for instance, where a certain man and his predecessors have from time immemorial used a right of way over another man's land. Again, prescription has its origin in a grant, evidenced by long usage, the loss of which is either actual or presumed, but this principle does not necessarily hold good in the case of a custom.

It should also be remembered that prescription cannot give a title to land, but only to easements and other "incorporeal hereditaments" (*i.e.*, rights relating to land, which can be inherited, but which are not tangible, and only arise by grant, such as reversions, titles, advowsons, etc.).

Under the Real Property Limitation Act, 1874, the possession of a house or land for twelve years without acknowledging, by the payment of rent or otherwise, anyone to be real owner, gives the possessor an absolute title to the property. The time is, however, subject to certain extensions—if the real owner has been under some disability which has prevented him from ejecting the trespasser during the twelve years.

PRESCRIPTION BY STATUTE.

In order to acquire a prescriptive right to an easement by Statute, it is necessary to enjoy the privilege which is claimed, in the manner and for the length of time set out in the **Prescription Act, 1832** (2 & 3 Will. IV., chapter 71).

This Act was passed with the object of shortening the time of prescription, and rendering more definite the acquisition of certain easements and rights of common and other *profits à prendre* by prescription.

The Act only applies to easements which are capable of interruption, and to such as have been enjoyed openly as though the enjoyment were an absolute right belonging to the claimant, and without some interruption by the servient owner lasting at least one year.

No legal right to an easement, or *profit à prendre*, can be established under the Statute until an action is brought, and it must be shown that the right has been enjoyed up to the time of bringing the action, and for the length of time required by the Act.

Shortly, the result of the Act is, that if the right claimed has, in the case of easements (excepting "Light," which is dealt with separately), been enjoyed openly and without interruption for twenty years, and in the case of *profits à prendre* for thirty years, the claim cannot be defeated merely by showing that the right was first enjoyed at some time subsequent to the year 1189, as was possible when the right was claimed at Common Law.

Primâ facie right.

Enjoyment for these lengths of time (namely, twenty and thirty years respectively) gives the claimant what is known as a "*primâ facie* right," but the claim is still liable to be defeated on grounds other than length of enjoyment, in the same way that it could have been, if the right had been claimed by prescription at Common Law, namely, those set out on p. 46, and numbered 3 to 8.

A **primâ facie right** is one which the law presumes to be absolute unless the person who is opposing the right which is claimed, can prove to the contrary. For instance, if A, an owner of land, proves that he has enjoyed, for twenty years, a right of way over land belonging to B, the law presumes that A has an easement of way over B's land, and A has then a *primâ facie* right of way; and unless B can prove that A's privilege has been enjoyed in some way inconsistent with the Prescription Act, A's right is as good as an absolute one.

Absolute right.

If, however, the enjoyment of an easement (other than "Light") has continued without interruption for forty years, or of a *profit à prendre* for sixty years, no objections can be raised by the servient owner, and the right to the easement or *profit à prendre* will be absolute and indefeasible, unless it was enjoyed by consent or agreement, and subject also to Section 8 of the Act, which provides that the time during which the servient tenement is let on a lease for more than three years, or is granted for a life, shall be deducted from the period of forty years, and thus prevent the acquisition of the easement, provided the claim be resisted by the reversioner within three years of the termination of the lease, or of the life tenancy.

It should also be noticed that by Section 7 the time during which the servient owner is an infant, idiot, lunatic, or tenant for life, or during which an action shall have been pending (*e.g.*, an action against the would-be dominant owner for trespass) shall be deducted from the twenty and thirty years' enjoyment of easements and *profits à prendre* respectively (which but for the deduction would have given the would-be dominant owner a *primâ facie* right), but it may not be deducted from those lengths of time which give an absolute right, namely, forty and sixty years respectively.

With regard to **Easements of Light,** Section 3 provides: that if any dwelling house, workshop or other building shall have enjoyed the access and use of light passing over the land of another for twenty years without interruption, the right shall be absolute, unless it was enjoyed by consent or agreement.

We will now consider the Prescription Act in detail. The full text of the Act will be found at the end of the book.

SECTION I deals with Rights of Common and other *profits à prendre* which may be lawfully claimed at Common Law, and enacts that if any right of common or other profit or benefit shall have been actually taken and enjoyed by any person claiming right thereto, for the full period of thirty years without interruption, the claim shall not be defeated or destroyed by merely showing that such right, profit or benefit, was first taken or enjoyed at any period prior to such period of thirty years, but that such claim may be defeated in any other way by which it could be defeated before the Act was passed. If, however, the right has been enjoyed for sixty years, it shall be absolute and indefeasible, "unless it shall appear that the same was taken by some Consent or Agreement expressly made or given for that purpose by Deed or Writing." *Profits à prendre.*

SECTION II deals with claims that may be "lawfully made at the Common Law, by Custom, Prescription or Grant, **to any Way or other Easement, or to any Watercourse, or the use of any Water,**" enjoyed without interruption over any land, including Crown lands. The wording of this section is similar to the first section, but the length of time during which an easement must be enjoyed in order to acquire a *prima facie* right is twenty years, and, to acquire an absolute right, forty years, unless the right was enjoyed by consent or agreement. As before explained, if only twenty years' enjoyment is proved, the claim may still be defeated in the same way that it could have been at Common Ordinary easements.

Law, with this exception, that mere proof of commencement at any time prior to the period of twenty years, will not by itself defeat the claim, as it would have done at Common Law. It will be noticed that the section deals with claims "to any Way or other Easement," and this has led to diversity of opinion in the Courts as to whether this was intended to include every kind of easement, or whether the words "way or other easement" mean only easements of the same kind or nature as a way: that is, something that is to be exercised upon or over the soil of the adjoining owner. The cases on the point are too numerous and conflicting to be discussed here, but we may point out that a claim to the uninterrupted passage of currents of air coming over another man's land, for driving a windmill, was held not to be maintainable as an easement under Section 2, as it would be impossible for the servient owner to interrupt, by reasonable means, the wind which drove the mill, and only easements which are capable of interruption can be acquired under the Act.

Another reason for supposing that the words "or other easement" must be limited in some way, is that it has been decided that an easement of light is governed entirely by the third and fourth sections of the Act, and does not come within the scope of Section 2.[1]

As of right.

The right claimed must have been "actually enjoyed by any person *claiming right* thereto without interruption for the full period of twenty years," and in Section 5 the claimant must allege "enjoyment thereof *as of Right*."

[1] *Perry* v. *Eames*, (1891) 1 Ch. 658.

These words mean that the enjoyment by the dominant owner must have been open, notorious, and without particular leave being given at the time, and enjoyed as a matter of right, and not secretly or by tacit sufferance, or by permission asked from time to time. It is not necessary that the claimant should, during the whole period of the twenty or forty years, have claimed to be legally entitled to the easement against the owner of the servient tenement[1]; actual uninterrupted enjoyment for the prescriptive period, without any title or justification, is enough.

Without interruption.

The Act expressly requires the enjoyment for the different periods to be "without interruption," and, therefore, necessarily suggests such a user as could be interrupted by the servient owner by reasonable means, and without unreasonable waste of labour and expense, if he chose to do so. But no claim to an easement can be upheld (with the exception of "Light," by reason of the wording of Section 3) unless the servient owner was, or could have been, if he had used ordinary observation, aware that the privilege was being enjoyed by the claimant. It is not enough that something has been visible from which an expert might have inferred the existence of an easement: the user must be obvious and unmistakable. By Section 4 nothing shall, however, be deemed an interruption unless it shall be submitted to or acquiesced in for the space of *one year* after the party interrupted shall have had notice thereof, and of the person making or authorising the same.

[1] *Gardner* v. *Hodgson*, (1900) 1 Ch. 592.

What constitutes an interruption.

The question has naturally arisen from time to time as to what constitutes an interruption within the meaning of the Act. It has been settled that the mode of interruption must be of a permanent character, so that a pile of empty boxes stacked in front of a window, the height of the stack varying owing to the boxes being frequently moved, although remaining there for a year, would not be considered an interruption.[1] The interruption must be an adverse obstruction and not a mere temporary discontinuance of user, or accidental interruption,[2] and must also be acquiesced in or submitted to by the person whose right has been interrupted, so that if the would-be dominant owner gives the party causing the obstruction notice that he does not really submit to or acquiesce in the interruption, there would be no acquiescence within the meaning of Section 4. It is not necessary for him to bring an action or to take active steps to remove the obstruction. But it must be always borne in mind that continual intermittent interruptions, although not lasting for a year, and although not acquiesced in by the would-be dominant owner, might be very strong evidence that the enjoyment had not been "as of right," and would probably defeat the claim.

Absolute right.

Section 2 further enacts that when an easement has been "so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some Consent or Agreement expressly given or made for that purpose

[1] *Presland* v. *Bingham*, 41 Ch.D. 268.

[2] *Smith* v. *Baxter*, (1900) 2 Ch. 138.

by Deed or Writing." This is known as **an absolute right**: it is, however, subject to the provisions of Section 8, should the servient tenement be let on lease or granted for life. A parol licence, whether gratuitous or for a consideration, if given before the commencement of the prescriptive period, would suffice to defeat a claim to a *primâ facie* right (*i.e.*, twenty years' enjoyment),[1] but it is insufficient to defeat an uninterrupted enjoyment for forty years, which is absolute and conclusive evidence of title to the easement, in the absence of any written consent or agreement.

It should be noted that when two tenements are held under one and the same landlord, the tenant of one of them cannot acquire an easement "as of right" under this section, over land in the occupation of the tenant of the other tenement (except an easement of light, as explained in a later chapter), even though the enjoyment and user have existed for the periods mentioned in the section, inasmuch as an easement can only be acquired under the section by prescription in respect of the freehold. A tenant may, however, acquire an easement over the land of a stranger on behalf of his landlord, and the latter will have the benefit of the easement when the tenant's lease has expired.

Easement of light.

SECTION III.—This section only deals with **rights of light**, and enacts that "When the access and use of light to and for any Dwelling House, Workshop, or other Building shall have been actually enjoyed therewith for the full period of **twenty years** without interruption, the right thereto shall be deemed

[1] *Gardner* v. *Hodgson's Kingston Breweries Co.*, (1900) 1 Ch. 592.

absolute and indefeasible, any local Usage or Custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some Consent or Agreement expressly made or given for that purpose by Deed or Writing."

This section differs from the first and second sections, inasmuch as it does not require that the claim to light should be one "which may be lawfully made by custom, prescription, or grant," or that the person enjoying the access of light should have claimed it as a right. Further, it does not expressly state that the right can be acquired over lands belonging to the King, and consequently it has been held that a right to light cannot be acquired over Crown lands. It will also be noticed that uninterrupted enjoyment for twenty years (prior to the date when an action is commenced: *Vide* Section 4) is all that is necessary to acquire an absolute right to light, and no deduction can be made from that period (as can be done in the case of other easements) either for the time during which the servient owner may be incapable of resisting the enjoyment of the light by the dominant owner, or for the time during which the servient tenement is let on lease. When once the right has been enjoyed for twenty years without interruption, the right is absolute and indefeasible, unless, of course, it has been enjoyed by agreement; so that even if the light has only been enjoyed for nineteen years and one day, and is then obstructed by the servient owner, it will be too late for him to prevent the easement being acquired, since by Section 4, nothing is to be deemed an interruption unless it is submitted to for one year: therefore, before the interruption could be effectual, the

No right of light over Crown lands.

Twenty years' enjoyment gives absolute right.

easement will have been enjoyed for the full period of twenty years without any interruption within the meaning of the Act (namely, one lasting for a whole year), and the right will then be absolute. It will not, however, be correct to say that after nineteen years and one day, the dominant owner has acquired an easement of light. He could not, for instance, obtain an injunction to restrain the servient owner from erecting, during the twentieth year, a building which will interfere with the light to which the dominant owner will be entitled when the full twenty years have run, for until then, he will not have acquired an easement which will prevent the servient owner from building in any way he pleases on his own land. After the completion of the twentieth year, the dominant owner will have acquired the easement, and could sue the servient owner for damages for obstructing his light, or possibly the Court would order the building to be removed.

The word "access" refers, not to the access through the aperture or window of the dominant tenement, but to the freedom of passage over the servient tenement,[1] although the aperture which admits the light into the dominant tenement defines the area which is to be kept free over the servient tenement. This aperture must be permanent and defined, and where the plaintiffs in an action were unable to prove that there had been an uninterrupted access of light through any one particular aperture for the twenty years, owing to timber having been from time to time so stacked as to block up one or

Aperture must be permanent.

[1] *Scott* v. *Pape*, 31 Ch.D. 554.

other of the apertures, their claim to an easement of light failed.[1]

The words "or other building" mean some building of a like character to a dwelling house or workshop, and will not necessarily include every structure which is held to be a building within the meaning of the London Building Acts.

The words "actually enjoyed" do not make it essential that the access of light should never be interrupted. For instance, in the case of windows fitted with movable shutters, which are opened only occasionally at the owner's pleasure, the right is, nevertheless, "actually enjoyed," and there is no such interruption as would, under Section 4, prevent the right from being acquired at the end of the twenty years.[2]

The words "without interruption" have the same meaning as already explained under Section 2.

Buildings may be pulled down and rebuilt.

"The right thereto" means the right to the same access and use of the light to and for any building: that is to say, if the building, which originally acquired the right to light, is pulled down and rebuilt, the right will not be lost, but will continue in the new building to the same extent as before.

It will be noticed that the only restriction to the acquisition of an easement of light, after twenty years' enjoyment, is that the right has been "enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." With regard to this, it has been held that a tenant in

[1] *Harris* v. *De Pinna*, 33 Ch.D. 238.

[2] *Cooper* v. *Straker*, 40 Ch.D. 21.

possession has power to make such agreement, or to obtain such consent, as the section requires.[1]

SECTION IV enacts that "each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this Statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof and of the person making or authorising the same to be made." Date of period of enjoyment. Interruption.

It will be remembered that by Sections 1 and 2 of the Act, when a person has enjoyed a privilege over the land of another for a certain period, such a right "shall not be defeated"; but it does not say that after that period the right "shall be at once acquired," although one expression is almost the equivalent of the other. By Section 4, however, it is plain that until an action is brought, either disputing or asserting the right claimed, the latter is merely an "inchoate" right: that is, a right which is begun but not completed, and one liable still to become of no avail if interrupted or not used. For instance, if one owner A has used a path over his neighbour B's land for forty-five years, and then had not used it for four years: if A again attempted to use it and B brought an action for trespass against him, and in his defence A pleaded that he had acquired a right of way over the path, A's defence would fail because

[1] *Hyam* v. *Van de Bergh*, (1908) 1 Ch. 167.

he has not enjoyed the right for the necessary period prior to the date when the action was commenced, there having been an interval of four years during which the right had not been exercised.

The claimant to an easement cannot commence an action merely for the purpose of establishing it under the Act. The action must of necessity be brought either by the servient owner, to resent some act done by the would-be dominant owner (*e.g.*, an action for trespass against the latter if he asserts that he has a right of way over the servient tenement), or else by the would-be dominant owner, to restrain his neighbour from obstructing the right which the former claims to be entitled to enjoy (*e.g.*, an action to restrain a neighbour from building in such a way as to obstruct an alleged right of light).

So that, in the first example, if the defendant proved that he or his predecessors in title had actually and openly used a path over the plaintiff's land, without interruption, for forty years prior to the date when the action commenced, the action for trespass would fail, and the defendant would then actually possess an easement, and not, as before the action, merely an inchoate right.

And in the second example, if the plaintiff could show that he had enjoyed, through his window in its present form, access of light over the defendant's land for twenty years, without any interruption submitted to for a year or more, he would win his case and would acquire an easement of light to the window in question.

With regard to the second portion of Section 4, the question as to what constitutes an interruption has already been discussed when considering Section 2.

Procedure in an action.

SECTION V deals with pleadings, and is unimportant for the purposes of this treatise. It enacts that where formerly it would have been necessary to allege a right to have existed from time immemorial, now it shall be sufficient to allege the enjoyment thereof, "as of right," by the occupier of the tenement in respect of which the claim is made, for the periods set out in the Act, and without claiming in the name of the freeholder. As already explained under Section 2, the words "as of right" mean openly, and without permission being asked at the time, and as though the dominant owner was legally entitled to exercise the privilege as a matter of right.

No *prima facie* right to be presumed for any less period than named in the Act.

SECTION VI provides that no presumption shall be allowed or made in support of any claim to a right that has not been enjoyed for the full lengths of time specified in the Act, according to the nature of the claim; that is to say, a claim to an easement cannot be made under the Act unless the right claimed has been enjoyed for at least twenty years.

Modifications of length of time for *prima facie* right.

SECTION VII.—This section specially provides for the protection of certain persons who, owing to some legal or physical disability, are incapable of resisting a claim to an easement, or *profit à prendre*, which is made by a would-be dominant owner. It allows the time during which such person is either an infant, idiot (*i.e.*, a person born insane), *non compos mentis* (*i.e.*, a lunatic or person who becomes insane), *feme covert* (*i.e.*, a married woman, but since the Married Women's Property Act, 1882, this disability no longer exists), or a tenant for life, to be deducted from the prescriptive period of twenty or thirty years, which, but for this deduction being made, would

have given the dominant owner a *primâ facie* right to the easement or *profit à prendre*, as the case may be. It expressly allows no deduction to be made on any of the above grounds of disability from those periods of enjoyment which make the rights absolute. Hence no deduction on the ground of disability is allowed from the twenty years which make a right to light absolute, or from the forty or sixty years respectively which make the right to any other easement, or to a *profit à prendre*, absolute.

The section also allows the time during which an action in respect of the claim shall have been proceeding, and which has been diligently continued, to be deducted from the periods which would otherwise give the dominant owner a *primâ facie* right, but not from those periods which make the right absolute and indefeasible.

For instance, if A had enjoyed an easement for twenty-two years; say for example, he had used a short cut from his house to the railway station, across B's field; and during five years of that time B was under the age of 21. These five years would be deducted from the twenty-two years, so that A would only be able to show seventeen years available user, instead of the requisite twenty years, and his claim would in consequence fail.

Again, if instead, B had been a lunatic for five out of the twenty-two years, the time during which he was insane could be deducted from the twenty years necessary to give a *primâ facie* right; but if A or his successors continued to use the short cut for forty years, then, even if B had been insane for the whole of the time, A's claim would be good, and he could acquire an absolute right to the easement.

It has been decided that if, in the above example, B was not under any disability, and A used the path over B's land for ten years, and then B was succeeded by C, who was under disability within Section 7, and who held the land for five years, during which time A still used the path: C died, and was succeeded by D, who was not under disability, and A still continued to use the path for another ten years over the land which now belonged to D, making twenty-five years' total enjoyment: D then brings an action for trespass against A, who claims that he has enjoyed the easement for twenty-five years preceding the action, or, deducting the five years during which C was under disability, for twenty years as required by the Act. The Court held that the first and last periods of ten years were sufficient to comply with the requirements of the Act (viz., twenty years' enjoyment before the action), and A was held to be entitled to the easement which he claimed.[1]

Then, again, if the land in question had been granted to B for his lifetime (*i.e.*, B was a tenant for life), and during B's tenancy A had used the path for the thirty-eight years next preceding an action for trespass brought against him by B, and claimed to be entitled to an easement, since he had used the path for more than twenty years, A's claim would fail, as the time during which the life tenancy existed would not be included in the computation of the twenty years necessary to acquire a *primâ facie* right, so as to prejudicially affect the person entitled to the land after the death of B.

[1] *Clayton* v. *Corby*, 11 L.J. Q.B. 239.

To illustrate the second portion of Section 7, suppose A had used the path over B's land for eighteen years and six months, and then B, not being under disability, had commenced an action for trespass against A, and although B had not delayed the action, he did not obtain judgment until two years after, during which time A continued to use the path, and thus had used it for over twenty years. In this case the time since the action commenced (that is, since the date of the issuing of the writ) will not count against B, and as A will only be able to show eighteen and a-half years' enjoyment, instead of twenty, his claim will fail.

As before stated, no deduction is allowed on the ground of disability of the servient owner, from the twenty years' enjoyment of the access of light to a building, which makes the right absolute; so that if A's windows have for twenty years overlooked land belonging to B, and B then obstructs them, A thereupon brings an action, and B as his defence pleads that for five out of the twenty years he has been an infant, thereby purporting to reduce A's effective enjoyment from twenty to only fifteen years, B's defence will fail, and A's right to light will be absolute: unless, of course, it had been enjoyed during the twenty years by consent or agreement in writing.

Modification of length of time for absolute right.

SECTION VIII.—This section provides that the time during which "any land or water upon, over, or from which any such way or other *convenient* watercourse or use of water shall have been enjoyed or derived," has been let on lease for a term exceeding

three years, or has been granted to a tenant for life, shall be deducted from the forty years' enjoyment which would otherwise make the right claimed absolute, provided the person who granted the lease, or his successors, take steps to stop the enjoyment of the easement within three years of the end of the lease, or of the death of the life tenant.

The word "convenient" has been considered to be a misprint in the Act for "easement or any"; and if the latter words are substituted, the section then is consistent with Section 2, and this is the only reasonable explanation that can be given, as otherwise the benefits of Section 8 would be restricted to rights of way, watercourses, and use of water, which could hardly have been the intention of the Act. It has, therefore, been held to apply to the same easements as are included in Section 2.

The Courts have held that the deduction for the time during which the servient tenement has been let on lease, may only be made from the forty years which would, but for the deduction, give an absolute right, and not from the twenty years which give a *prima facie* right.[1]

An illustration may perhaps make the meaning of Section 8 clearer. Suppose A, a freeholder, grants a lease of land to B for forty-five years. C, a neighbouring owner, immediately begins to use a path over the land let to B, and continues to do so for forty years. B, the tenant, does not prevent him, and A, the freeholder, does not know that C has been using the path at all. Were it not for Section 8, C, at the end of the lease, would have

[1] *Palk* v. *Shinner*, 22 L.J. Q.B. 27.

acquired an absolute right of way, but by this section, provided A, within three years of the termination of the lease, stops C from using the path, or brings an action against him for trespass, C will be prevented from acquiring a right of way over A's land.

The reason for this provision is, that the only person who can sue for trespass, unless apparent permanent damage is done to the land, is the person in possession of the land, and it would be unfair that the freeholder or his successors should suffer for the tenant's default or collusion, since any tenant can, by his acquiescence, allow the creation of an easement over his landlord's land, by a neighbour, and cannot, in the absence of express agreement, be compelled to take or allow any steps to be taken to prevent it.[1]

Section IX enacts that the Act shall not extend to Scotland or Ireland.

Section X fixes the date of commencement of the Act.

Section XI provides that the Act may be amended, altered or repealed during the then present session of Parliament (1832).

Easements can still be Acquired at Common Law.

Although the Prescription Act was presumably passed with the intention of rendering the acquisition of easements and *profits à prendre* more definite, it is still possible to obtain them by prescription at Common Law, instead of under the Act. For

[1] *Hyam* v. *Van de Bergh*, (1908) 1 Ch. 167.

instance, although a claimant may not be able to prove that the enjoyment of the right claimed was immediately prior to the commencement of the action, or if there has been an interruption lasting a year, and thus precluding a claim under the Statute, the Courts may still presume a lost grant on the necessary enjoyment being proved. There are no negative words in the Act to take away rights existing independently of it; in fact, in claiming an easement, it is everyday practice to plead—(1) Enjoyment for twenty years before action; (2) Enjoyment for forty years before action; (3) Enjoyment from time immemorial; (4) A lost grant.[1] It has always been understood that a right may be supported on the third ground, although it may be incapable of being supported upon the first and second.

Take, for example, the case of a claim to a right of light. Assuming the light has been enjoyed for twenty years, there are two defences open to the servient owner—(1) That it was enjoyed by virtue of some agreement under Section 3; (2) That it has been obstructed for more than a year under Section 4. If either of these defences is applicable, the claimant cannot evade the Act by setting up any mode of claim other than that conferred upon him by the Act. But suppose the defence is that, during the twenty years, the easement was extinguished owing to the dominant and the servient tenements coming into the same ownership and occupation for part of the time. In such a case the claim could still be made on any ground

[1] *Per* Mellish, L.J., *Aynsley* v. *Glover*, L.R. 10 Ch. 283.

available before the Act, since the Act says nothing about unity of title or unity of possession as a defence. It is therefore open to the plaintiff to plead his enjoyment from time immemorial; and, if he can prove enjoyment for over twenty years, the Court may presume a lost grant.[1]

SUMMARY OF CHAPTER V.

1.—Enjoyment by one owner of a privilege over the land of another, for a long period, makes it possible for the former to establish a presumption that the latter has granted a right to such privilege. It is on this ground that an easement can be acquired at Common Law, by the Courts presuming the loss of such grant.

2.—It is possible to acquire an easement at Common Law, and not by Statute, in such cases as—

(*a*) When the right claimed is one not mentioned by the Prescription Act;

(*b*) If the period of user did not immediately precede the commencement of the action.

3.—Legal memory extends as far back as the year 1189. At Common Law, however, a "Lost Grant" is generally presumed on proof of enjoyment of a right for *twenty years*.

4.—At Common Law an easement is established after twenty years' enjoyment, unless the person opposing the claim can show—

(*a*) That the enjoyment commenced since 1189;

(*b*) That the alleged lost grant could not have been legally made;

(*c*) That the easement has been extinguished;

[1] This was the opinion expressed by Lord Justice Farwell in a recent case in the Court of Appeal: *Hyam* v. *Van de Bergh*, (1908) 1 Ch. 167.

(*d*) That it was impossible for him to know of the privilege being enjoyed;

(*e*) That he could not resist the enjoyment by reasonable means;

(*f*) That the enjoyment had only been intermittent.

5.—The Prescription Act applies to—

(*a*) Rights of common and other *profits à prendre*:

Thirty years' enjoyment gives a *prima facie* right;

Sixty years' enjoyment gives an absolute right;

(*b*) Ways or other easements, watercourses and use of water:

Twenty years' enjoyment gives a *prima facie* right;

Forty years' enjoyment gives an absolute right.

(*c*) Rights of light to buildings:

Twenty years' enjoyment gives an absolute right.

6.—The above periods of enjoyment must date immediately before the bringing of an action (*e.g.*, for obstruction or trespass).

7.—An "interruption" is a cessation, for a period of one year, of the enjoyment of a privilege.

8.—In order to obtain an easement by prescription, the privilege must have been enjoyed openly and "as of right," *i.e.*, not surreptitiously.

9.—Periods during which a servient owner or his predecessor has been an infant, idiot, lunatic, or tenant for life, can be deducted from the term of enjoyment giving a *prima facie* right, but not from that giving an absolute right.

10.—A freeholder who lets his land on lease for a long term or grants it to a tenant for life, is protected, in case such lessee or tenant for life allows an adjoining owner to exercise privileges over the land, by being allowed a period of *three years* after the expiration of the tenancy, during which to take steps to stop such enjoyment, and so prevent the acquisition of an easement.

CHAPTER VI.

The Prevention of Acquisition of Easements: The Various Kinds of Easements: Capacity to Acquire and to Grant Easements.

Resistance to acquisition of easements.

After considering the acquisition of easements, and the effect which they necessarily have of abridging the natural rights connected with ownership of land, the question naturally arises, How can the acquisition of easements be prevented?

There are two methods of resisting the would-be dominant owner, namely:—

(*a*) By taking legal action, *e.g.*, an action for trespass;

(*b*) By physical action, *i.e.*, by preventing him from continuing to enjoy the right which he seeks to establish.

Take, for instance, the example given in a previous chapter of a man taking a short cut over his neighbour's field to the railway station. Here the latter can sue the former for trespass, or can apply to the High Court for an injunction to restrain him from continuing to trespass; or he may by physical means prevent him from entering his field, by erecting a wall or fence. A similar choice of remedies—and by employing one he would not forego the other—would exist in the case of one owner pasturing his cattle over his neighbour's land, or discharging the rain water from his roof over that of his neighbour.

But in other cases there may not be alternative remedies, and the landowner may be restricted to one or the other. For instance, suppose my neighbour builds a house with windows overlooking my land, and so near to my boundary, that if I were to build close to the edge of my land I should obstruct practically all the light which his windows enjoyed. This I am entitled to do: but suppose I do not wish to build just then, how am I to prevent my neighbour acquiring an easement of light, which he will do, if the windows enjoy the light for twenty years uninterruptedly, and which would prevent me from then building anything likely to obstruct the light to those windows? It is clear that I cannot bring an action against him to prevent him forming the windows where he pleases in his own house, since every owner of a house is entitled to do this, for he has not infringed any right of mine, nor has he caused me to suffer any legal injury, as disturbance of privacy is not an injury which the law will recognise. My only remedy, therefore, is, before his windows have enjoyed the light long enough for him to acquire an easement, to build either a temporary or permanent obstruction on my own land, in such a way as to obstruct the light coming to the windows in question, even if by so doing I deprive my neighbour of almost the whole of the light and make his rooms quite dark. It is not a question of my having "a right to obstruct"; I am simply exercising my ordinary right of building on my own land in any way I please, provided that in so doing I do not interfere with the rights of others; and in this case, until my neighbour has acquired an easement, he has no right to the light coming from the space over my

land. This is why one frequently sees temporary wooden screens erected in front of windows overlooking vacant land which, by obstructing the light, prevent an easement of light being acquired, so that if the owner of the vacant land, wishes to build at any later time, he will be able to do so, provided the house, or whatever he builds, does not obstruct the light to the windows to a greater extent than the temporary screen did.

Cases in which physical resistance to user is impossible.

Take another example: Suppose a neighbour discharges the effluent, or waste products, of his dye works into a stream which passes through my land, so as to affect the purity of the water and render it unfit for agricultural purposes. In this case, since I cannot by any physical act prevent him from polluting the stream, I have only a legal remedy, and I can bring an action to restrain him from infringing my natural right to the purity of water flowing through my land, and thus prevent his acquiring an easement to pollute the stream.

Easements must be capable of interruption.

With the exception of a right to support of a building by land (the law as to which, and the leading case on the subject, viz., *Angus* v. *Dalton*, will be considered when dealing with the easement of "Support"), it is a general rule that no easement can be acquired by prescription, either at Common Law or under the Prescription Act, unless the servient owner is capable of resisting the user either by reasonable means (that is to say, means which would not involve an unreasonable outlay of expense or trouble), or by bringing an action at law. If the servient owner is incapable of resisting the user, there can be no presumption of a grant having been made and lost, and, as before explained, the

Prescription Act suggests a power to interrupt the easement claimed, and therefore only applies to easements which are capable of interruption. For instance, no prescriptive right could be acquired under the Act by a mine owner who only owned the subjacent soil, and not the surface land, to work his mine without leaving any support for the surface land. The reason for this was that no act had been done on the surface land, and the owner of the surface land had no means of preventing the mine owner from excavating the subjacent land in any manner he chose.

Again, no easement for the continued flow of a temporary artificial stream, such as one caused by the pumping of water out of a colliery, can be acquired by the owners of land over which the stream flowed, against the owners of the mine, since the latter could not, without going to unreasonable expense, prevent the former from using the water: neither could they do so by legal action.

Again, in the following case, a confectioner had, for more than twenty years prior to 1873, used a pestle and mortar in his back premises which abutted on the garden of a doctor, and had made considerable noise and vibration. This was not felt as a nuisance, until the doctor, in 1873, built a consulting room at the end of his garden. The noise and vibration then became a nuisance, and the doctor brought an action for an injunction to abate it. The confectioner claimed to have acquired an easement to transmit noise and vibration over the doctor's land, having done so for over twenty years; but the Court held that no such right had been acquired, as, until the consulting room was built, and the noise became

a nuisance, and as such actionable, the doctor had no means of preventing it by action at law or otherwise.[1]

THE VARIOUS KINDS OF EASEMENTS.

There are six principal classes into which easements are divided, and all the different kinds of easements, which will be considered in detail later, must come under one or more of the following headings :—

1. Affirmative.

Those which allow the dominant owner to actually do something on the land of the servient owner, *e.g.*, a right of way, which allows him to pass over the servient tenement.

2. Negative.

Those which do not involve a right entitling the dominant owner to do anything on the land of the servient owner, but simply give the former a right to prevent the servient owner from exercising an ordinary right of property over his own land, *e.g.*, a right of light, which prevents the servient owner from building in some particular position on his own land.

It will be remembered that in the definition of an easement given in Chapter I., an owner of land may be bound to "submit to some definite use of his land," *i.e.*, an affirmative easement; or "to refrain from some particular use of it himself," *i.e.*, a negative easement.

[1] *Sturges* v. *Bridgman*, 48 L.J. Ch. 785.

3. **Continuous.**

Those which are enjoyed without any act on the part of the dominant owner, and which continue without the interference of man, *e.g.*, a right of support to a building, a right to light, or a right to the passage of rainwater through a neighbour's eaves-gutter.

4. **Discontinuous.**

Those which are enjoyed only by some fresh act on the part of the dominant owner, each time he wishes to exercise his right, *e.g.*, a right to draw water from a well, or a right of way, which is only exercised when the dominant owner passes over the servient tenement.

5. **Apparent.**

Those which, by external signs of existence, are evident to a person of ordinary intelligence, from inspection of the tenement, *e.g.*, a right of way or a right to light. In these cases, the path would suggest the existence of the right of way, and the windows would suggest the right to light; but it is not enough that something has been visible from which an expert might have inferred the existence of an easement.

6. **Non-apparent.**

Those which are not ostensibly seen to exist, and the enjoyment of which would not necessarily be evident, *e.g.*, an easement of support to a building, where it would not necessarily be apparent that any more support was required from the neighbour's soil to support a building, than was required to support the land unweighted by the building.

It will be obvious that any one easement may fall within two or more of the above headings: for instance, a right of way is an affirmative, discontinuous and apparent easement; a right to light is negative, continuous and apparent; a right to support is negative (since the servient owner has to refrain from excavating his land in such a way as to withdraw the support to which his neighbour is entitled), continuous, and possibly non-apparent.

THE RIGHTS OR PRIVILEGES WHICH ARE OBTAINABLE AS EASEMENTS.

The principal easements that can be acquired are the following:—(1) light, (2) air, (3) support, (4) water, (5) way. There are other less important rights which may become easements, but which are not frequently met with, such as a right to fasten clothes lines and to dry linen, a right to nail trees to a wall, a right to use a neighbour's chimney for the passage of smoke, a right to tether horses, a right to have a sign post on a common in front of a public house, etc., but in an elementary treatise on the subject it is only necessary to deal with the five principal easements.

The essentials of an easement.

No man can have an easement over his own property. There must be two distinct tenements:—

(*a*) The dominant tenement to which the right belongs;

(*b*) The servient tenement upon which the obligation is imposed.

It is clear that if the two tenements are the property of the same owner, the exercise of the right, which in other cases would be the subject of an

easement, is, during the continuance of his ownership, one of the ordinary rights of property only, which he may vary or determine at pleasure without in any way increasing or diminishing those rights. The inferior right of easement is merged in the higher title of ownership.

Tenant cannot acquire easement against his landlord.

It is on this principle that a tenant cannot acquire an easement (with the exception of a right of light, which, as will be seen later, can be acquired under the Prescription Act) over land belonging to his landlord, for the possession and user by the tenant, is the possession and user of his landlord, and the latter could not acquire an easement in his own soil. Nothing, however, prevents a landlord from expressly granting any right or privilege he pleases to his tenant, and in some cases a grant may be implied; also, as previously explained, a tenant may acquire an easement over the land of a stranger on behalf of his landlord.

It is essential that an easement shall be for the benefit of the dominant tenement, and not for another. For instance, a man cannot acquire an easement to obstruct a stream, for the benefit of someone else on the opposite bank.

Another characteristic of easements, considered generally, is that an easement only imposes an obligation on the servient owner to submit to, or refrain from doing, something in his own tenement for the benefit of the dominant owner, and is not an obligation to do or perform anything. The servient owner's obligation is passive and not active. For example, a right to light is a right to compel the servient owner to refrain from obstructing the light; and a right of way is a

right whereby the servient owner must allow the dominant owner to pass over his land. For this reason it has been held that the grantor of a right of way is not bound to repair the way: but that the grantee (*i.e.*, the dominant owner) has a right to do so, and to enter on the land of the grantor for that purpose, so that the object of the grant may not be nullified. There may, however, be rights lawfully imposed upon a landowner, such as to maintain a fence or repair a road—obliging him to do work for the benefit of a neighbour; but such rights are not easements, and depend upon entirely different principles of law.

If the servient owner obstructs or interferes with the enjoyment of an easement, the dominant owner may either take legal proceedings, or, after notice and request to remove the obstruction, pull down the obstruction, provided he does not do more damage than is necessary for that purpose.

CAPACITY TO ACQUIRE AND GRANT EASEMENTS.

Capacity to acquire.

With regard to capacity to **acquire easements.** Any owner of land can acquire by express grant, and, since an easement is for his benefit, the law would presume that he assents to it, unless he expressly dissents.

If a grant be made to **an infant,** he may disclaim it when he comes of age; but if he die during minority, or if he die after he is of age, without having assented to the grant, his heir need not accept it. A grant made to a **lunatic or idiot** will be upheld if it is fair and made *bonâ fide*.

No question as to the acquisition or granting of easements by implied grant, apart from express grant, can arise, since an implied grant must always depend on some express grant. For instance, in the case of an implied grant of a right of light to a house, the implied grant arises out of the express grant of the house.

Anyone can acquire an easement by prescription, even though he was under some legal disability (such as infancy or lunacy) at the time when the assumed lost grant was supposed to have been made. **A tenant** can acquire an easement, on behalf of his landlord, over adjoining lands, but cannot acquire one over *other* land of his landlord, with the exception of a right in the nature of an easement of light, which, after twenty years' enjoyment, he can acquire, and which will last till the end of his lease.

Capacity to grant.

With regard to capacity to **grant easements**.

Anyone may grant an easement, even if he be under legal disability at the time; but when he becomes free from such disability, he can annul or avoid the grant if it was to his disadvantage.

A lunatic who makes a grant cannot allege his own insanity to avoid the grant; but after his death his heir may avoid the grant, on the ground of the lunatic's incapacity. Mental incapacity will not annul a contract, if the incapacity be unknown to the other contracting party, and no advantage has been taken of the incapable person, especially if the contract has been executed, so that it is impossible for the parties to be restored to their original position.

Where an easement is claimed by prescription at Common Law, the presumption of a grant having

been made and lost cannot be raised, if, at the time when the grant was supposed to have been made, the servient owner was incapable of having made the alleged grant. When an easement is claimed under the Prescription Act, it will be remembered that provision is made in Section 7 for the deduction of the time during which the servient owner is under disability. This, however, does not apply to the easement of light.

SUMMARY OF CHAPTER VI.

1.—A man may prevent the acquisition of an Easement over his land—

(*a*) By a legal action against anyone interfering with his natural rights (such as bringing an action for trespass).

(*b*) By a physical action—that is to say, doing something on his own land which renders it impossible for another to interfere with his rights (such as erecting a fence to prevent the trespass, or erecting a hoarding to prevent light from his own land entering the windows of his neighbour's house).

2.—If a privilege enjoyed by one owner over the land of another be of such a nature that the other cannot resist the user, either by legal or physical action, such privilege cannot become an easement.

There is an exception to this rule, namely, that of a right of support to a building, from the land of another.

3.—Easements may be—

(*a*) Affirmative (*e.g.*, a right of way).

(*b*) Negative (*e.g.*, a right of light, or air, which is really a right to prevent the servient owner from building: a right of support to a building, which is really an abridgment of somebody's natural right to excavate his own land, or to pull down his own building).

(*c*) Continuous (*e.g.*, a right of support, or light).

(*d*) Discontinuous (*e.g.*, a right of way).

(*e*) Apparent (*e.g.*, a right of light, air, or way).

(*f*) Non-apparent (*e.g.*, a right of support to a building by adjoining land).

4.—The most important rights or privileges which can become easements are—

(*a*) Rights to Light.

(*b*) Rights to Air.

(*c*) Rights of Support.

(*d*) Rights in Water.

(*e*) Rights of Way.

5.—For a privilege to become an easement—

(*a*) There must be two tenements (dominant and servient). Rights which an owner of a plot of land enjoys over his own adjoining plot are not easements; they are ordinary rights of property. Also any easement acquired by a tenant while occupying land, is acquired on behalf of, and belongs to, his landlord.

(*b*) The privilege must be for the benefit of the dominant owner and not for another person.

(*c*) It must only impose on the servient owner the obligation of submitting to some use of his land, or refraining from some particular use of it himself. It does not impose on the servient owner an obligation to do any particular act.

(*d*) It must not include a participation in the profits of the soil of the servient owner.

6.—Any owner of land is capable of acquiring an easement over the land of another.

7.—Any owner of land is capable of granting an easement; but if such easement were granted while the grantor was an infant, or mentally incapable, such grant may afterwards be revoked.

CHAPTER VII.

Easements of Light and Air.

Although the easements of light and air are very similar in their nature—in familiar parlance, indeed, one frequently speaks of them as one, in the phrase a "light and air case"—it is advisable to consider them separately.

LIGHT.

Natural right to light.

Strictly speaking, the only **natural right** to light that a man can possess, is to receive the light which is vertically over his land. On the other hand, it is the undoubted right of every owner of a house or other building, to form any windows in it he pleases, for the purpose of admitting light and air, and, as explained in a previous chapter, by so doing he does no legal injury to the owner of the land which the windows overlook. The reason for this is, that until an easement of light has been acquired, nothing prevents the owner of the adjoining land from building on his own land a wall or screen which will entirely obstruct the windows in question.

How easement of light obtained.

However, should the access of light to the windows have been enjoyed for twenty years, without interruption and without the written consent of the owner of the land, the windows become what are known as **ancient lights.** The owner of the house will, after an action has been brought,

acquire a right of light, and the owner of the adjoining land will have to refrain from building on his land in such a way as to hinder the light from entering the windows of the house. What, therefore, is called a "right to light" is not really a right to the light, but is a negative easement which curtails a neighbour's ordinary proprietary right to build as he pleases on his own land.

Purposes for which an easement of light may be acquired.

As already explained in Chapter V, an easement of light can only be claimed as appurtenant to a permanent building. It has been held that no right can be acquired in respect of an open yard used for storing timber and in which there is a saw pit[1]; neither can a right be acquired to a temporary building, even though it remains in position for twenty years. A wooden staging of several floors, used for drying timber, has been held not to be a building to which a right of light could be acquired,[2] although the right can be acquired to a greenhouse[3] and to a photographer's studio.[4]

The easement can only be acquired in respect of a defined aperture, which need not necessarily be a window; it may be a glazed door, or a skylight, or any opening made for the purpose of admitting light.

The twenty years necessary to acquire an easement of light by prescription, begin to run, and, in the case of implied or express grant, the right comes into existence, as soon as the window openings are formed in a new building and the roof is on. It is

[1] *Roberts* v. *Macord*, 1 Moo. & Rob. 230.
[2] *Harris* v. *De Pinna*, 33 Ch.D. 238.
[3] *Clifford* v. *Holt*, (1899) 1 Ch. 698.
[4] *Lazarus* v. *Artistic Photographic Co.*, (1897) 2 Ch. 214.

not necessary for the window frames and sashes or glass to be in the openings, nor need the building be fit for occupation. All that is necessary is that the light shall come through a defined aperture in a permanent building.

ACQUISITION OF RIGHT OF LIGHT.

An easement of light may be acquired in the same way as other easements, viz., by express or implied grant, and by prescription, either at Common Law or under the Prescription Act.

1.—EXPRESS GRANT.

Various forms of grant.

The extent of a right of light given by express grant will depend on the wording of the grant. As in the case of other easements, the instrument creating the right must (unless it be a Will) be made under seal, unless it is a written or verbal agreement which has been partly performed, in which case an equitable right will be given, which can be enforced, as explained in a previous chapter.

Since a right of light is a negative easement, an express grant does not give any definite quantity of light, but the grantor undertakes not to build within a certain distance of the windows of the building which is being conveyed by the grant, or which is to be erected. For instance, if a man is selling a part of his land, and the purchaser wishes to protect the windows of a house, which he proposes to build, from interference by buildings which may be subsequently built on the vendor's land, such protection is afforded by the vendor covenanting in the conveyance that neither he nor his successors will build

Reservation.

within a certain distance of the edge of the land which is then being sold to the purchaser. Again, a right of light may be expressly reserved, as in the case of the owner of a house and land, selling part of the land close to the house, and wishing to reserve a right of light to the windows of the house overlooking the land which is sold, in which case the purchaser will covenant that neither he nor his successors will build within a certain distance of the house.

A right of light may also be granted by a special written agreement under seal, granting the privilege, irrespective of any conveyance or other matter; for instance, two neighbours might agree not to build within a certain distance of their respective boundaries or houses.

The right can also be granted by Will, which may deal either with a right of light only, or may grant it together with buildings.

A tenant has no power to grant a right of light over the land which he holds, for a greater length of time than the duration of his lease. For example, if the freeholder of a house lives next door to such house as a tenant of someone else, and during his tenancy grants, to the tenant of his own house, a right of light over the garden of the house which he (the landlord) occupies, and at the end of his tenancy buys the freehold of the house he occupies, so that he then owns both houses, he is not prevented from altering the house of which he has just purchased the freehold, in such a way as to interfere with the light enjoyed by his own tenant next door.[1]

[1] *Booth* v. *Alcock*, L.R. 8 Ch. 663.

2.—IMPLIED GRANT.

Implied grant an adjunct to an express grant.

An easement of light by implied grant arises when the owner of a house and land adjoining, sells the house, and retains the adjoining land for his own use. By selling the house with windows overlooking his own land, the vendor is presumed to have granted a right of light to those windows which overlook the land, and consequently he must not afterwards obstruct such light. Further, if having sold the house, the vendor subsequently sells the land to a third person, the latter will also be prevented from building in such a way as to obstruct the windows of the house (even if the land were sold to him as "building land"), since a vendor of the land can only sell it subject to the same restrictions with which it was burdened while in his possession.

On the other hand, if the owner of the house and land in the last example sold the land without any restrictions, and retained the house, there would be no implied reservation of the right of light which would prevent the purchaser of the land from building on it in any way he chose, and, if he (the purchaser) wished, he could obstruct the windows of the house. If the vendor intended to reserve a right of light to the windows of the house, he should have covenanted with the purchaser of the land in the conveyance, not to build within a certain distance of the house.

Implied grant attached to building land.

An easement of light also arises by implied grant when part of an estate is sold as "building land," and the vendor and all subsequent purchasers from him will be prevented from building, on the land

retained, in such a way as to obstruct the lights of houses which are afterwards built on the land sold as "building land."

If a house and land are sold by the owner of both at the same time to different purchasers, who are aware of the simultaneous conveyance, the purchaser of the land is not entitled to obstruct the lights of the house; and if several houses are sold simultaneously, and each house enjoys light from over the other's ground, a right to light is implied to each.

There can be no implied grant of a right to light to windows which overlook land belonging to a stranger, who has nothing whatever to do with the sale of the house, because a vendor has no power to grant rights interfering with those of a stranger.

In some cases an implied grant of light may be limited by special circumstances,[1] as, for instance, where the land was part of a building scheme for the improvement of a town, and the purchaser knew that houses were likely to be built opposite to his, there would be no implied right to unobstructed light to a greater extent than was necessary for the ordinary enjoyment of the premises. However, the purchaser is entitled to have the windows of his house unobstructed by buildings which are not in accordance with the scheme which was in contemplation at the time of the purchase, *e.g.*, when the purchaser knew that the land which his windows overlooked would be used for railway purposes, he was held to be entitled to restrain the erection of a different class of building.[2]

[1] *Godwin* v. *Schweppes, Limited*, (1902) 1 Ch. 926.
[2] *Myers* v. *Catterson*, 43 Ch.D. 470.

In every case, in order to see whether a grant of light over adjacent land ought to be implied, two things have to be enquired into: (1) the title of the alleged grantor, to see whether his interest in the land would support a grant of light by him; (2) the surrounding circumstances affecting the two pieces of land, and which were known to both parties.[1]

Acquiescence.

In some cases acquiescence, if coupled with some implied permission, will create an easement of light. For example, when a tenant rebuilt his premises, which adjoined those of his landlord, and formed new windows and altered old ones, and the plans of the building were approved by the landlord and his surveyor, and the alterations were carried out under the latter's supervision, the landlord was afterwards restrained from building in such a way as to obstruct the new and altered windows.[2]

The mere fact of allowing an owner of adjoining land to construct windows overlooking one's land does not give him any implied right to light. The only means of preventing him acquiring the right is by putting up a screen or other erection so as to obstruct the windows after they are made.

3.—PRESCRIPTION AT COMMON LAW.

Easement of light obtainable by Prescription at Common Law.

As previously explained in Chapter V (p. 67) a right to light may still be claimed on any ground available before the passing of the Prescription Act, when the defences provided by the Act are not

[1] *Quicke* v. *Chapman*, (1903) 1 Ch. 659.

[2] *Cotching* v. *Bassett*, 32 Beav. 101.

applicable to the particular case in point. The Act did not alter the previous law with respect to ancient lights, there being no negative words in the Statute to take away rights existing independently of it. It is a matter for the discretion of the claimant whether he claims the right at Common Law or under the Statute, and he can plead either or both. Since, however, Section 3 of the Prescription Act deals exclusively with rights of light, it is more usual for the right to be claimed under the Act.

4.—PRESCRIPTION UNDER THE PRESCRIPTION ACT.

This method of acquiring an easement of light has already been considered at some length in Chapter V when dealing with Section 3 of the Prescription Act.

That section, it will be remembered, states that "when the access and use of light to any dwelling house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

This section must be read with Section 4, which requires the prescriptive period to be "the period next before some suit or action"; consequently the right of light is not absolute and indefeasible even after the expiration of the twenty years'

enjoyment, unless and until some action or suit is commenced in which the right is in question. Until that occurs the right remains inchoate or incomplete.

Section 3 abrogates "any local usage or custom," and the effect of this, it may be noticed, was to do away with the old custom in London and York that any owner of a house or of ancient foundations of a house in those cities could, as he pleased, raise the house or build a new one on the ancient foundations, even if by so doing he interfered with the rights of light of his neighbour.

It will be noticed that in the case of light, the Act does not require the enjoyment to be "as of right"; it only says "actually enjoyed therewith for the full period of twenty years without interruption," and, since every owner of a building is entitled to form any window in it that he pleases, when once such window has enjoyed the light for twenty years without interruption, and an action is brought, the right of light becomes absolute, unless it was enjoyed by consent or agreement.

It has been held that a money payment for permission to enjoy light is not an interruption within the meaning of Section 3, since that section must be read with Section 4, and the latter section requires an interruption of the easement to be submitted to or acquiesced in for at least a year, and the payment of rent would cause no such interruption.[1]

An absolute right of light could therefore be acquired after twenty years' enjoyment, in spite of

[1] *Plasterers' Co. v. Parish Clerks' Co.*, 20 L.J.Ex. 362.

the payment of rent for permission to enjoy the light, unless there was a consent or agreement in writing in addition.

The time during which the building, and the land over which the right of light is claimed, are in the same occupation, must not be included in the computation of the twenty years.[1] However, the twenty years need not be continuous; they may be partly before and partly after unity of occupation. And when an easement of light exists, union of the ownership of the dominant and servient tenements for different "estates" (where, for instance, a man has the freehold estate in one, and a leasehold estate for five hundred years in the other) does not extinguish the easement, but merely suspends it so long as the union of ownership continues, and upon severance of the ownership the easement revives.[2]

The question whether there has been an actual enjoyment of the use of light for the statutory period is a question of fact, to be determined according to the circumstances of each case.[3]

Non-user of light.

Non-user of a right of light, which would not be sufficient to prove that the easement had been abandoned by the dominant owner, may still be enough to prevent the acquisition of that right under the Act, and the user or non-user of light cannot be entirely determined by simply considering whether the thing which obstructs the light is fixed or moveable.[4] For instance, where the

[1] *Ladyman* v. *Grave*, L.R. 6 Ch. 763.
[2] *Simper* v. *Foley*, 5 L.T. 669.
[3] *Smith* v. *Baxter* (1900) 2 Ch. 138.
[4] *Ibid.*

windows of a house were boarded up on the inside by the owner for his own purposes, it was held that no right of light has been acquired, although the windows had existed for twenty years; but if the windows had shutters which were only occasionally opened by the owner at his pleasure, a right of light could be acquired, since, as explained in Chapter V, the enjoyment need not be absolutely continuous.

It will be evident that the all-important point, in order to acquire an easement of light under Section 3, is to prove uninterrupted enjoyment of the light for twenty years immediately preceding some suit or action in which the right is questioned. For, in a case[1] where the light had actually been enjoyed for twenty years, but no action brought, and then owing to the ignorance of the dominant owner as to his rights, the enjoyment was continued by consent in writing for seven years, and then an action was brought, the Court held that the enjoyment had not been without some consent for twenty years preceding the action, and consequently the claim to the easement of light failed. The tenant in occupation is competent to make such agreement or to obtain such consent as Section 3 requires. The "consent" seems to be the consent of the servient owner not to obstruct the light.

Building may be altered

In order to acquire an easement of light it is not necessary that the aperture, through which the light enters the dominant owner's building, should remain exactly the same throughout the statutory period of twenty years. It is sufficient if, notwithstanding alterations to the building, including alterations in

[1] *Hyam* v. *Van de Bergh*, (1908) 1 Ch. 167.

the position and size of the windows, a substantial part of the cones of light enjoyed through the original windows still continues to be enjoyed through new apertures in the dominant tenement, and to reach the positions formerly occupied by the original windows. The right to light so acquired is limited to a right to such part of the cones of light as has been continuously enjoyed throughout the period of twenty years. Only such alterations to a building as would involve the loss of an existing right of light would, if made during the currency of the statutory period, prevent time running for the acquisition of a right of light.[1]

Tenant can acquire right of light against his landlord.

The easement of light appears at first sight to be an exception to the rule that a tenant cannot acquire an easement over the land of his landlord. For instance, if two adjoining houses are owned by the same landlord and are let to different tenants, and one house has windows overlooking the garden of the other, after twenty years' enjoyment of this light, the tenant of the house will acquire a right in the nature of an easement of light, both as against the other tenant and against the landlord and his successors in title. This right is not, strictly speaking, an easement in the true sense of the word, since an easement is a right acquired over the lands of another, and in this case the freehold of each tenement may belong to one and the same landlord. The fact that the servient tenement was let on lease does not prevent the acquisition of a right of light over it, since, as will be remembered, Section 8 of the Prescription Act, which allows the

[1] *Andrews* v. *White*, (1907) 2 Ch. 500.

time during which the servient tenement has been let on lease, to be deducted from the forty years' enjoyment of other easements, does not apply to the easement of light, so that no deduction can be made on this account.

Tenancy need not be continuous.

Also, it is immaterial whether the house has been in the occupation of the same tenant for the whole of the twenty years, so long as the light has been uninterruptedly enjoyed for that length of time. For example, one tenant might enjoy the light during a seven years' lease, and be succeeded by another tenant who took a twenty-one years' lease. At the end of thirteen years the latter would, after an action had been brought, acquire an absolute right of light for the remainder of his lease, and it would make no difference if, instead of taking a twenty-one years' lease, he had taken, first, say a seven years' lease, and it had been renewed or agreed to be renewed by the landlord, so long as he enjoyed the light for twenty years without interruption.

A tenant's interest in land is, of course, limited by his lease. For instance, the tenant of a house, which had been built in such a position as to obstruct an ancient light, is not entitled to remove the obstructing part of the house without his landlord's consent; neither is he responsible for the continuance of the obstruction. If, however, the tenant builds in such a way as to obstruct his neighbour's ancient lights, he is naturally responsible for the injury.

The easement of light is also an exception to the rule that a servient owner must have knowledge that an easement is being acquired, before the dominant owner can claim it. The reason for this is that anyone, by exercising ordinary powers of observation,

can see that a window is enjoying the access of light over the servient tenement, since a window cannot be hidden, or the light enjoyed secretly. Further, no deduction from the twenty years can be made for the time during which the servient owner is under some disability, as previously explained when dealing with Section 7 of the Prescription Act.

Notice of obstruction should be given.

The person who erects a screen, or in some other way obstructs his neighbour's windows in order to prevent the acquisition of an easement of light, should obtain and preserve evidence of the date of erection of the screen. He should also give his neighbour notice that he has erected it, as it may be necessary to prove the date when the lights were first obstructed, should the neighbour subsequently bring an action against him for obstructing the light.

The person whose windows have been obstructed should, if he claims to be entitled to the light, give the person causing the obstruction notice that he does not submit to it. He need not bring an action at once, nor take active steps to remove the obstruction, provided that he gives such notice.

Extent of the Right to Light.

The extent of a right to light has been the subject of much litigation.

At one time it was held, and accepted, that when once a right to light had been acquired, the dominant owner was, for ever after, entitled to the amount of light existing at the time when the right was acquired, and that the light must

not be interfered with in the slightest degree, whether any appreciable damage or inconvenience was suffered by so doing or not.

Angle of forty-five degrees.

At another time there was a theory that so long as the obstructing building allowed light to reach the ancient light at an angle of forty-five degrees, there would be no infringement of the dominant owner's right of light. This limit is not recognised at law, although the fact may be used as evidence to show that the obstruction of light is only slight. The theory of the angle of forty-five degrees being left unobstructed arose from the old Metropolitan Building Act, which enacted that the height of a building must not exceed the breadth of the street, so that if a street were forty feet wide and the houses forty feet high, light would thus fall at an angle of forty-five degrees.

Deprivation of light must now be substantial.

The amount of light to which the owner of ancient lights is entitled seems never to have been definitely decided until the year 1904. In order to give a right of action there must now be a substantial deprivation of light having access to the "ancient" window. The person claiming that his right of light has been interfered with, must show that the deprivation of light is sufficient to make the occupation of the building uncomfortable, or that his business has been affected, or that the value of the premises has depreciated in consequence of the obstruction.

The most important case dealing with rights of light is *Colls* v. *Home and Colonial Stores*,[1] which was tried in 1904, when it was finally decided by the

[1] (1904) A.C. 179.

House of Lords, that the owner of ancient lights, in the event of interference therewith by new buildings, is not, as a matter of Common Law, entitled to the same amount of light as his premises enjoyed before the interference; and that the Prescription Act has not the effect, which has sometimes been attributed to it, of giving him an absolute right to the full amount of light which he enjoyed during the twenty years' enjoyment, by virtue of which the right of light has been acquired. The owner is only entitled to the uninterrupted access through his ancient windows of such an amount of light as is necessary, according to ordinary notions, for the ordinary purposes of inhabitancy or business, without regard to the particular purpose for which he used the light.

Obstruction must amount to a nuisance.

To justify the granting of an injunction restraining the obstruction, the interruption of the light must be of such a character as to constitute a nuisance, by affecting the comfort or convenience of the owner.

What is a nuisance?

The question of obstruction of ancient lights is, therefore, whether or not the obstruction amounts to a nuisance? The test, since the above decision, is **not** how much light has been taken away from the dominant tenant, or whether such amount is enough to lessen materially the enjoyment and use of the house that its owner previously had, **but** how much light is left, and whether such amount is sufficient for the comfortable use and enjoyment of the house, according to the ordinary requirements of mankind.

In another case,[1] tried in 1906, and upheld by the House of Lords, where the ancient lights of a

[1] *Jolly* v. *Kine*, (1907) A.C. 1.

suburban villa had been obstructed, in consequence of which the letting and selling value of the villa was depreciated, the Court held that the dominant owner had a cause of action, and that the proper remedy was damages, and not an injunction to restrain the continuance of the obstruction. But the Courts will not in every case, and against the dominant owner's wish, award damages instead of an injunction when an ancient light is threatened, as, to do so, would virtually be to compel him to sell his right to the person who erects the obstruction.[1]

Subject, of course, to the particular circumstances of each case, the question to be decided in disputes as to alleged obstruction of ancient lights is, whether such appreciable damage has been caused to the dominant owner as will amount to a nuisance, and it will generally be found that it is a fair working rule, although not recognised by law, that if an angle of forty-five degrees of light has been left, there is no substantial injury suffered, and therefore no actionable wrong is likely to exist.

Angle of forty-five degrees a fair working rule.

The foregoing are the rights of the dominant owner when the right of light has been acquired by prescription.

If the acquisition is by express grant, the grant may define and limit the amount of light required or it may restrict the user for a particular purpose.

Extent of User of Light.

A right to a special amount of light necessary for a particular business, such as that of an architect, cannot be acquired by twenty years' enjoyment,

[1] *Cowper* v. *Laidler*, (1903) 2 Ch. 337.

even if the servient owner is aware that a larger amount of light than is ordinarily necessary is being used by the dominant owner for the purposes of his business. The reason for this is that if only an *ordinary* quantity of light is claimable, the servient owner knows his exact position, and within what limits he may build, and whether, during the twenty years, it is worth his while to obstruct his neighbour's windows: whereas, if a right to an *extraordinary* quantity of light could be acquired, the servient owner would never know his exact position, and, because of this uncertainty, interruption would be impossible by reasonable means: hence no right to a special or extraordinary quantity of light can be acquired under the Prescription Act.[1] But such a right could be acquired by grant, either express or implied. For instance, if a person requires a special quantity of light for his business, and this is known to the vendor or lessor of the house, and the house is sold or let for that particular business, a grant of the special quantity of light will be implied against the vendor or lessor.[2]

Servient owner may obstruct enlargement of ancient windows.

If the owner of ancient windows enlarges them so as to admit a greater quantity of light than he enjoyed before, or if he forms new windows, he thereby threatens to impose a greater burden on the servient tenement than formerly. If the enlarged windows or the new ones remain unobstructed for twenty years, a right of light will be acquired to the enlargement, in addition to the original ancient lights, and also to the new windows.

[1] *Ambler* v. *Gordon*, (1905) 1 K.B. 417.

[2] *Herz* v. *Union Bank of London*, 2 Giff. 686.

Whilst the owner of the ancient lights commits no wrongful act by enlarging them, or by forming new windows, the servient owner, on the other hand, is at liberty to obstruct both the enlargement and the new windows, by any means in his power, before the twenty years have expired. He may, for example, erect a hoarding with a space cut out of it the same size as the ancient window was before enlargement, or he may obstruct the new windows altogether; but he must not cause any obstruction to the part of the enlarged windows which is "ancient," and it is often difficult to avoid doing so. If he is unable to do this without obstructing the ancient lights as well, he must not obstruct them at all, and has no remedy at law, and the Courts, in granting an injunction restraining the servient owner from obstructing ancient lights, will not make it a condition that the new windows, or the enlargement of the old ones, shall be blocked up.

It should be noticed that "light" is an exception to the general rule (which will be considered in a later chapter) that when it is impossible for a servient owner to prevent an excessive use of an easement, he may obstruct it altogether.

Dominant owner may rebuild without losing rights.

The owner of ancient lights is entitled to pull down and rebuild his house, and he may bring forward the wall in which the windows are, or he may set it back, without losing his rights.

All that he must show is, that the same quantity of light which passed through the old windows is passing through the new ones, and, unless he (the dominant owner) has enlarged them, the servient owner has no right to obstruct the altered windows in any way.

It is a good plan for the owner of ancient lights who is rebuilding, to have accurate plans or photographs taken of the ancient windows before the building is pulled down, so as to be able to prove their exact position, in case the servient owner should raise any objection to the windows in the new building, or if he should attempt to obstruct them.

The dominant owner may alter the plane of the windows without losing his right of light; for instance, a dormer window could be turned into a skylight, and the right of light would still continue: but the dominant owner will lose his right, if the alteration is such that it is impossible to identify, in the new building, the former position of the ancient lights.

Extinction of Rights of Light.

An easement of light may be extinguished in the same way as other easements, as explained in a later chapter, viz., by Act of Parliament, by express renunciation, by abandonment through non-user, and by both the dominant and the servient tenements being owned and occupied by one person.

But if a house possessing ancient lights is let on lease, and the owner of the servient tenement buys the freehold of the house, so that he then owns the freehold of both tenements, this will not cause the right of light to the house to be extinguished, since as long as the lease runs there will be no unity of occupation. Mere unity of possession of the freehold, without unity of occupation, will not extinguish the easement.[1]

[1] *Richardson* v. *Graham*, (1908) 1 K.B. 39.

Abandonment.

Questions may arise as to what constitutes an abandonment by non-user. For instance, an owner of ancient lights pulled down the wall containing the windows, and rebuilt it without any openings. After seventeen years the servient owner built close to the wall, whereupon the owner of the former ancient lights cut a window in his blank wall, and brought an action against the servient owner for obstructing his light. The Court held that the dominant owner could not maintain his action, because, by erecting the blank wall, he had not only ceased to enjoy the light, but had clearly shewn an intention never to resume such enjoyment.[1]

Where a dominant owner blocked up his ancient windows with rubble and plaster, in such a way and for such a length of time (viz., nineteen years) as to lead the servient owner to think that the right had been abandoned, and the servient owner erected a building which would have obstructed the ancient lights, had they not been blocked up, it was held that the dominant owner was estopped from saying that he had not abandoned his right of light, unless he compensated the servient owner for the expense he had incurred.[2]

Again, as explained in Chapter II., if the servient owner does some act, with the permission of the dominant owner, the result of which is to permanently obstruct the light, the easement will be extinguished.[3]

In another case, where the dominant owner pulled down his buildings and erected new ones, preserving

[1] *Moore* v. *Rawson*, 3 B. & C. 332.
[2] *Stokoe* v. *Singers*, 26 L.J. Q.B. 257.
[3] *Ankerson* v. *Connelly*, (1907) 1 Ch. 678.

the ancient lights, but in such a position that it became impossible for the servient owner to erect buildings on his land without interfering with the ancient lights, whereas before the rebuilding he would have been able to do so, the Court held that the dominant owner had increased the burden on the servient owner's land; that it was impossible to sever the burden and say that he was still entitled to impose on the servient owner's land the burden which previously existed; that he could no longer maintain an action against the servient owner for interference with his ancient lights, and that he had no longer any right to any easement of light and air over the servient owner's land.

When light enjoyed by express grant.

Although, as previously explained, an owner of ancient lights, the right to which has been acquired by prescription, is allowed to enlarge or alter them without losing his rights, it is different when the right of light has been acquired by express grant. In the latter case a material alteration in the size and position of the windows may possibly destroy the right, as it was probably the intention of the grantor that the window should be of a certain size or in a certain position only.

No Easement of Prospect.

Before leaving the consideration of rights of light, it may be mentioned that there is no easement of prospect.

In many cases it has been attempted to establish a right to a view from a house, but it has been persistently laid down by the Courts, that neither is

there any such natural right, nor can an easement for the same be acquired, either by prescription or by implied grant.

Right of prospect may exist by agreement.

It is, of course, within the power of any two landowners to agree between themselves that one of them shall refrain from building in such a way as to interfere with the view from the windows or ground of the other. Such an agreement does not create an easement, and, in the event of an obstructing building being erected, merely gives a right of action for breach of contract, and not for trespass, as would be the case if the enjoyment of an easement were interrupted.

Not only can there be no easement in respect of a view *from* the house, but no easement can be acquired to the uninterrupted view *of* a house or shop so that it can be seen by persons approaching or passing along the road; unless, of course, a right of light has been acquired and is being interfered with.

AIR.

The only **natural rights** of a landowner in respect of air are—

Natural rights.

(1) To the use of the air perpendicularly over his tenement, whether such air be in a state of rest or flowing past.

(2) To receive in an unpolluted state the air which passes over his tenement. This does not mean that the landowner is entitled to have the air absolutely and entirely free from pollution, which would of course be impossible in cities and

towns, especially where there are manufactures, but that it must not be polluted to such an extent as to be incompatible with the physical comfort of human existence.

In the same way that the owner of a house may form windows and use the light which comes over his neighbour's land, without doing any legal injury, so also a landowner has a right to make use of the air which comes to his land from over that of his neighbour. For example, he may use it to drive a windmill; but this right is subordinate to the ordinary proprietary right of his neighbour, to build on his own land when and wherever he pleases; and it has been held that no right to the flow of air, not coming through a defined aperture, can be acquired by prescription. This was the decision in two well-known cases, one of them being in respect of a windmill and the other concerning a chimney.

Right to use air.

Windmill.

The plaintiff had erected a windmill which for thirty years had been driven by wind passing over the defendant's land. The defendant then built a school house within twenty-five yards of the mill, which obstructed and diverted the currents of air that formerly passed to the mill. The plaintiff claimed that the flow of wind should not be interrupted, and that he was entitled to it by prescription. The Court, however, decided that such a claim was not a right to an easement within the meaning of Section 2 of the Prescription Act, because the easements contemplated by Section 2, were only such as would be exercised upon or over the soil of an adjoining owner, and were capable of interruption. They held, further, that the claim could not be

supported at Common Law upon the presumption of a lost grant arising from the uninterrupted enjoyment as of right for a certain term of years, because they thought that such a presumption only arose where the person, against whom the right was claimed, might have interrupted or prevented the exercise of the right: and in the case of a windmill it would be, if not absolutely impossible, yet so difficult to prevent the exercise of the right claimed that no such presumption of a grant could be raised.[1]

Chimneys.

In the second case, where the plaintiff claimed to have the free access of air to his chimneys, and added a claim in respect of nuisance, he and the defendants were occupiers of adjoining houses which had remained in the same condition for some thirty or forty years. The defendants, in rebuilding their house, carried up the building much beyond its former height, and stacked timber on the roof, thereby causing the plaintiff's chimneys to smoke whenever he lighted fires. The Court, however, held that the plaintiff could not recover, as no easement could be acquired to air not coming through a defined aperture to a chimney, any more than it could in the case of a windmill.[2]

Right to air passing through defined channel

Although an easement to the uninterrupted access of air, not coming by any definite channel, but only over the general surface of a neighbour's land, cannot be acquired by prescription, **a right of air may be claimed by prescription at Common Law if the air passes through a defined channel on the servient tenement.**

[1] *Webb* v. *Bird*, 10 C.B. N.S. 268.

[2] *Bryant* v. *Lefever*, L.R. 4 C.P.D. 172.

For instance, where the cellar of a public-house had been for forty years uninterruptedly ventilated by means of a hole cut through a certain rock into an old well in a yard belonging to the servient owner, and the latter knew that his well was being used for this purpose, and subsequently stopped up the hole, it was held that the publican could claim the easement of the free passage of air from the cellar, and that the existence of a lost grant could be assumed.[1]

An easement of air may also arise **by express or implied grant,** and in this case it is not necessary that the air should pass only through a defined channel on the servient tenement, provided it comes *to* a defined aperture on the dominant tenement, and a grant of such a right may be implied from general words in a conveyance of a building, if the grantor is the freeholder of the adjoining land over which the air comes, and even if such land is let on lease. For example, a stable was sold which was ventilated by apertures to which the air had access over an open yard of which the vendor was the freeholder. The yard was subsequently let on lease, and the tenant put up a hoarding close to the ventilators of the stable. The Court held, on the principle of derogation from a grant, that neither the vendor, nor the tenant, could erect anything on the yard which would prevent the use of the stable as a stable, and ordered the hoarding to be removed.[2]

or to a defined aperture.

Again, where land had been let for the express purpose of carrying on the business of a timber merchant, it was held that the grantor or his

[1] *Bass* v. *Gregory*, 25 Q.B.D. 481.

[2] *Cable* v. *Bryant*, (1908) 1 Ch. 259.

successors were not entitled to obstruct the access of air to the timber merchant's drying sheds, in such a way as to prevent the land being used for the purpose for which it had been let.[1] In another case it was held that the right to the access of air could undoubtedly be acquired at Common Law, not by prescription, but by reason of an implied covenant not to interrupt the access of air to a slaughter-house which had been used for upwards of thirty years; and the plaintiff was awarded damages for the breach of the implied covenant.[2]

Implied covenant not to interrupt flow of air.

Questions as to rights of air do not, as a rule, arise apart from "light," since the right of air is necessarily incident to a right of light, it being impossible to obstruct the flow of air without also obstructing the light, and, if the windows were "ancient," this would be an actionable wrong. Therefore, when a man acquires a right of light to a window or opening, he at the same time acquires a right to such amount of air space as is necessary to conduct the light to his window.

The extent or limit of this right is in all probability the same as in the case of light.

RIGHT TO POLLUTE AIR.

With regard to a landowner's second natural right in air, viz., that it shall pass over his tenement in an unpolluted state, this, as already explained, does not mean that he is entitled to have the air absolutely free from pollution.

Limit of natural right of purity.

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[1] *Aldin* v. *Latimer*, (1894) 2 Ch. 437.

[2] *Hall* v. *Lichfield Brewery Co.*, 49 L.J. Ch. 655.

But if a person, by reason of the manufactures which he carries on, so pollutes the air as to interfere with the comfort of his neighbours, they can obtain redress by legal action, and the Courts will compel the cessation of such pollution.

Pollution amounting to a nuisance.

Again, if the pollution becomes a nuisance to the inhabitants of a town or district, any of them can obtain similar redress. And it is no defence for the manufacturer to say that the person making the complaint came to live in the district after the pollution had commenced: nor is it a defence to say that the air is already more or less polluted by other manufacturers.

A right to pollute the air passing over a neighbour's land may be acquired by grant, or by prescription at Common Law, or under the Prescription Act.

Implied right to pollute air.

The right to pollute air may arise by **implied grant**: when, for instance, a man sells part of his land for the erection of a chemical factory, he thereby impliedly grants the purchaser a right to pollute the air which will pass over the vendor's land, with the smoke, effluvia, &c., of the factory. Such an easement by implied grant would only be valid against the vendor himself, and it would not prevent any other person who might be affected by the nuisance, from suing the manufacturer.

When polluted air from a factory, etc., has been passed over a neighbouring owner's land for twenty years, and he has not resisted the nuisance by legal proceedings, the owner of the factory will acquire a prescriptive right to continue to pollute the air which passes over such land.

No easement can be acquired to pollute air as against the public generally, so as to become a public nuisance. The reason for this is, that although the public are capable of taking a grant, they are incapable of making one, and as no easement can be acquired against persons who are incapable of making a grant, therefore no easement can be acquired against the public.

No easement to pollute air against the public.

In concluding this chapter it may be remarked that the right to a flow of air to a building being admitted as an easement recognised by law, there can be no doubt that the converse right, that the air in a building should be allowed to escape through or over an adjoining property for the purpose of ventilation, must also be recognised as an easement.

Air from a building.

For instance, on a grant of an imaginary vertically divided half of an outside wall of a house with the intention of making it a party wall, each owner has an implied easement to allow smoke from his fireplaces to pass into the flues connected therewith, although at any point in its passage up a flue, the smoke may pass to the other owner's half of the flue; and each owner is in such a case liable for the repair of his own half of the party wall only, and is not liable for the escape of his smoke into his neighbour's house, owing to the non-repair of the latter's half of the wall.[1]

Passage of smoke.

In another case[2] the defendant was ordered to remove a skylight which he had placed over his yard, and which materially impeded the passage of

Ventilation.

[1] *Jones* v. *Pritchard*, (1908) 1 Ch. 520.

[2] *Gale* v. *Abbott*, 8 Jur. N.S. 987.

air to the window of the plaintiff's back kitchen. It was by that means alone that a thorough ventilation of the plaintiff's house existed, and accordingly the benefit was appreciable.

Interference with air, a nuisance.

Again, in a case which had reference to the premises of the Auction Mart Company in Token-house Yard,[1] Vice-Chancellor Wood said: "There is a staircase lighted in a certain manner by windows which, when open, admit air. The defendants are about to shut up these windows, as in a box with the lid off, by a wall about eight or nine feet distant, and some forty-five feet high; and in that circumscribed space they propose to put three water closets. There are difficulties about the case of air as distinguished from that of light. But the Court has interfered to prevent the obstruction of all circulation of air, and the introduction of three water closets into a confined space of this description is, I think, an interference with air which this Court will recognise in the form of nuisance. This is, perhaps, the proper ground on which to place the interference of the Court, although in decrees the words 'light' and 'air' are often inserted together, as if the two things went *pari passu*."

SUMMARY OF CHAPTER VII.

1.—The only natural right to light is that of an owner to the light obtained from the space vertically over his land.

2.—An easement of light is a negative easement which prevents an adjoining owner from building within

[1] *Dent* v. *Auction Mart Company*, L.R. 2 Eq. 238.

certain limits. It does not convey to the dominant owner a right to any particular quantity of light to a window.

3.—An easement of light can only be acquired in respect of light passing through a defined aperture in a permanent building.

4.—An implied grant can only arise as an adjunct to an express grant. When a man sells land for "building purposes," the purchaser acquires by implied grant an easement of light to the buildings he erects overlooking the land of the vendor.

5.—Easements of light can be acquired by Prescription at Common Law as well as under the Statute.

6.—The acquisition of an easement of light under the Statute differs from the acquisition of any other kind of easement, in the following respects—

(*a*) Twenty years' user gives an absolute right.

(*b*) It is not necessary to show that the light was enjoyed "as of right," or with the knowledge of the servient owner.

(*c*) Sections 7 and 8 of the Prescription Act do not apply.

(*d*) No easement of light can be acquired, under the Statute, over Crown land.

7.—A tenant may acquire by prescription a right of light over his landlord's adjoining land. Such right, however, only lasts for the term of the tenant's lease.

8.—When a building containing an ancient window has been pulled down and rebuilt, the owner of the new building is entitled to the whole of the light previously enjoyed in respect of the ancient windows, even though the new windows are erected in slightly different places. The change of position of the windows must, however, put no extra burden on the servient owner.

9.—An easement of light can only be acquired by prescription, to such a quantity of light as is necessary for ordinary purposes of inhabitancy or business, and not to any extraordinary quantity required for any special purpose.

10.—If buildings are not erected on adjoining land so as to intercept a plane at an angle of forty-five degrees with the horizontal, from the bottom of the window, it would be evidence that the obstruction caused by the building would be slight. In the majority of cases this is a fair test to apply, although it is not recognised by the Courts as a hard and fast rule.

11.—No Right of Prospect can be acquired by prescription.

12.—Natural Rights of Air are—

(*a*) To space overhead.

(*b*) To unpolluted air.

13.—No easement can be acquired in respect of a supply of air which does not come through a defined aperture.

14.—Rights to air are usually acquired in conjunction with rights to light, since, in the case of a window, it would be impossible to obstruct the air without also obstructing the light.

15.—A right to pollute the air passing over the land of another may be acquired by prescription.

CHAPTER VIII.

SUPPORT.

EVERY landowner has a **natural right** that his land shall not be disturbed by the removal of the lateral support given to it by the land of his neighbour, or, in cases where the ownership of land is divided horizontally (*e.g.*, where one man owns the surface land, and another the mines), by the removal of the subjacent soil in such a way as to disturb the surface land. Right to support of soil in natural state.

This natural right is limited to land in its natural state, and does not apply to land weighted with buildings, although, after buildings have been erected, the natural right of support to the *land* apart from the buildings will still continue, as though no buildings had ever been put upon it.

Opposed to this natural right to support is the ordinary right of property, possessed by every owner of land, that he may do what he pleases on his own land provided he does not thereby curtail the rights of others. He may excavate his land to the fullest extent, whether it be adjacent or subjacent land, so long as no disturbance of his neighbour's land takes place. But if it is obvious that the neighbour's natural right of support is being imperilled, the latter may obtain an injunction to prevent further excavation, or, if actual injury has Right to excavate.

been caused to his land, may bring an action for an injunction and damages. If buildings have been erected on a piece of land, and the owner of the adjacent or subjacent soil excavates so close to them as to cause a subsidence, and in such a manner that, in any case, the land itself, even if no buildings had been erected, would necessarily have fallen in, the owner of the buildings will have a right of action against the adjacent owner for interfering with his natural right of support.

No right of action for damage until damage suffered.

In such a case, the right of action dates from the time when the damage first occurs, or from any later time when other similar damage takes place, due to the same cause. For instance, where the owner of a mine excavated, causing damage to the surface land, which was repaired by agreement, and, although the mine was not further worked there was another subsidence about ten years later, the House of Lords held that a fresh cause of action arose when the subsequent damage occurred owing to the later subsidence.[1] The Statutes of Limitations limit the time during which a person may bring an action of this kind, to six years from the time when the damage or injury was suffered.

When mines retained by vendor.

If the vendor of land sells the surface land, but reserves the subjacent mines, together with the right to work the minerals, this will not deprive the purchaser of his natural right of support, and, in addition, there will be an implied grant by the vendor of a right of support to the surface land.

[1] *Mitchell* v. *Darley Main Colliery Co.*, 11 App. Cas. 127.

EASEMENT OF SUPPORT.

Easement of support obtainable to buildings from adjacent land or buildings.

As already stated, there is no natural right of support to a building, but an easement of support can be acquired to a building, either to the support given to it by adjacent or subjacent soil, or by an adjacent building, or, in the case of buildings in flats, from a flat below. An easement of support to a building is a negative easement, the servient owner being, in consequence thereof, obliged to refrain from excavating his own land to the extent he would otherwise be entitled to do.

The extent of the support necessary will depend on the nature of the ground—whether it be rocky, in which case little, if any, adjacent support would be needed, or whether it is a loose soil which would require considerable support.

The easement of support of a building by adjacent land, or by an adjacent building, may be acquired by express or implied grant, or by prescription at Common Law. Whether an easement of support of a building by adjacent land can be acquired under the Prescription Act, or not, has never been definitely decided, but it has been held that a right of support to a building by an adjoining building *can* be acquired under the Act.

ACQUISITION OF RIGHT OF SUPPORT BY EXPRESS GRANT.

A right of support may be acquired by express grant or reservation, and its extent will depend on the wording of the deed.

ACQUISITION OF RIGHT OF SUPPORT BY IMPLIED GRANT.

Building land.

Where land is sold for "building purposes," or as "building land," the vendor impliedly grants a right of support, by his own adjoining land, to the buildings which are to be erected on the land sold, and any subsequent purchaser of the vendor's land will be bound by the implied grant.

In a similar way, if the owner of a house and land, sells the land adjoining the house, he will, apparently, impliedly reserve a right of support to the house, since it would be an easement of necessity.

If a man builds two or more houses together at the same time, so that each will require and derive support from the house on either side of it (as it naturally will do), and if the houses are afterwards sold to different people, each purchaser will acquire a right of support from the adjoining house by implied grant, and the vendor will have a similar right by implied reservation in respect of any of his adjoining houses which he does not sell. Subsequent purchasers of the houses will buy them subject to, and with the benefit of, the easement of support.

ACQUISITION OF RIGHT OF SUPPORT BY PRESCRIPTION.

Easement of support to a building, obtainable at Common Law.

Few questions respecting the Law of Easements have awakened such an amount of controversy as whether an easement of support can or cannot be acquired by prescription. This question gave rise to the celebrated case of *Dalton* v. *Angus*,[1] which occupied the attention of the House of Lords on appeal

[1] 6 App. Cas. 740.

for a considerable period, and was the medium of various learned dissertations on the Law of Prescription, delivered by the eminent Judges forming the Court on that occasion. It is beyond the scope of this treatise to enquire minutely into the reasons for the various carefully-considered decisions given by the Judges: but it may be stated generally, that a **right to lateral support from adjoining land may be acquired at Common Law by twenty years' uninterrupted enjoyment, to a building** which is proved, either to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time: and the right is so acquired if the enjoyment is peaceable, and without deception or concealment, and so openly that it must be known that some support is being enjoyed by the building. This case decided that the Easement of Support could be acquired at Common Law, although not, strictly speaking, by prescription in the way that other easements are obtained, since the servient owner was incapable of resisting the user; the Court being of opinion that twenty years' acquiescence was sufficient and reasonable time to elapse in order to presume the assent of the owner of the land which had to bear the pressure of the additional burden put upon it. *Dalton* v. *Angus* established that a prescriptive right to an easement over another man's land can only be acquired when the enjoyment is of such a character that an ordinary owner of land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment.[1]

[1] *Union Lighterage* v. *London Graving Dock*, (1901) 2 Ch. 300.

Doubtful whether support to a building by adjacent land can be an easement under the Prescription Act

Lord Selborne expressed an opinion that a right of support to a building by adjacent land is an easement within the meaning of Section 2 of the Prescription Act, but the other Judges did not concur in that opinion, so this point has not been definitely decided. It has, however, been held, that a right of support *to* a building *by* a contiguous building, built at the same or at a different time by a different owner, can be acquired under the Prescription Act after twenty years' enjoyment,[1] but it must be shown that the owner of the servient tenement knew, or has the means of knowing, that his building was affording support to the other[2]; and the enjoyment must be of such a nature that his attention ought reasonably to have been drawn to the existence of the easement.

But support by adjacent building can be

If two houses are built against each other, but have separate and independent walls resting upon separate and independent foundations, so as to stand independently of each other, one has no right to support from the other, unless the right is acquired by grant or prescription. Still, it is the duty of any person who pulls down a house which rests against, or is in contact with, an adjoining house, to use due care and skill in doing so; and if damage results from lack of care and precaution, the person who is pulling down his house will be liable for damage caused to the adjoining house. There is, however, no obligation, apart from Statute (*e.g.*, The London Building Act, 1894), upon the person who is pulling down his house, to shore up the adjoining house, or to give the adjoining owner notice of his intention of pulling down his house.

[1] *Lemaitre* v. *Davis*, 51 L.J. Ch. 173.
[2] *Gately* v. *Martin*, (1900) 2 Ir.R. 269.

By Section 93 of the **London Building Act, 1894,** if a building owner intends to build within ten feet of a building belonging to an adjoining owner, and below the level of the foundations of such building, he may, and if required by the adjoining owner, shall, underpin or otherwise strengthen the foundations of such building as may be necessary. Two months' notice must be given to the adjoining owner, accompanied with plans and sections showing the proposed building and the depth to which it is proposed to excavate. The building owner is liable to compensate the adjoining owner and occupier for any inconvenience, loss, or damage which may result from the works. This Act only applies to London. In the provinces a similar provision is sometimes made in the bye-laws of the different Local Authorities.

Protection of adjoining house.

If a house possessing an easement of support is pulled down for the purposes of repair, the easement will not be lost if the house is rebuilt within a reasonable time.

House pulled down

In the case of **support from underground water,** which sometimes occurs owing to the porous nature of the land, or from other circumstances, such as water naturally or accidentally oozing under the soil, in such a way that the upward pressure affords material support to the surface land, there is no natural right to such support: and if an adjoining owner, by reason of building operations or otherwise, drains such water away, there is nothing at Common Law to prevent him doing so. It might happen that such a right of support by underground water could be acquired, if the act of draining would be in derogation of an express or implied grant. And

No easement of support from underground water

where a house was supported by a bed of wet sand, or running silt, and not merely by a stratum of underground water, and, owing to an adjoining owner's excavation, a large quantity of the silt was removed, and a subsidence occurred, which injured the house, the Court of Appeal held that the adjoining owner had committed an actionable nuisance at Common Law, entitling the owner of the house to damages.[1]

RIGHT OF SUPPORT TO FLATS.

With regard to the question of support in the case of buildings divided into flats—that is, the right to have an upper flat upheld by a lower one—Chief Baron Pollock said: "It seems a matter of plain common sense that . . . . no man who becomes possessed of one of the houses (all built together and obviously requiring mutual support) . . . . can be in a situation to say to his neighbours, 'You are not entitled to the protection of my house. I will pull down my house and let the house on each side collapse, and fall into the ruins of my own.' It seems to me impossible not to come to the conclusion that the law must be in accordance with what is so plain and sensible."[2] This would seem to apply with equal, if not greater, force to houses which are divided horizontally (*i.e.*, into flats). In *Dalton* v. *Angus*, Lord Chancellor Selborne laid it down that if a building "is divided into floors or flats, separately owned, the owner of each upper storey or flat is entitled to vertical support from the lower part of the building, and to the benefit of

[1] *Jordeson* v. *Sutton Gas Co.*, (1899) 2 Ch. 217.
[2] *Richards* v. *Rose*, 9 Ex. 218.

such lateral support as may be of right enjoyed by the building itself. Using the language of the Law of Easements, I say that in the case alike of vertical and of lateral support, both to land and buildings, the dominant tenement imposes upon the servient a positive and constant burden, the sustenance of which by the servient tenement is necessary for the safety and stability of the dominant."

In accordance with a rule of the general Law of Easements, the right to the support of the lower storey, or of an adjoining house, does not impose upon the owner of such lower storey or house, the duty of actively maintaining the support. In other words, the implied grant of support, or the acquired easement of support, does not include an implied covenant on the part of the servient owner to repair, but the dominant owner may enter the servient tenement to do the necessary repairs.

No implied covenant to repair lower storey.

In the case of flats, the amount of support is at least that which is necessary to the upper owner to maintain his premises in the position in which they were at the time when the grant was implied. On the other hand, it is clear that he may not impose upon the lower premises a greater weight than they are able to bear, but will be liable in damages for any injury which may be caused to them, or to their contents, by reason of his overloading.

Extent of support to flats.

RIGHT OF SUPPORT TO SURFACE LAND OVER MINES.

It frequently happens that the owner of mining land may have sold the subsoil and minerals, for the purpose of mining, or he may have sold the surface and reserved the mining rights.

Support from subjacent land.

The question then naturally arises, Is the owner of the subsoil to be so restrained in the scope of his mining operations as to be compelled to leave sufficient support to prevent the subsidence of the surface land? No right can be acquired *by prescription* to work mines in such a way as to leave no support to the surface land, since the mine-owner does no act on the surface land which the owner of the surface land could prevent; neither has the latter any means of preventing the mine-owner from excavating in any way he pleases.[1]

When implied reservation of support.

As before stated, if the owner sells the surface land and retains the subjacent land, the purchaser has a natural right of support to the surface land, or, in the alternative, a right of support by implied grant. If an owner of land sells the subsoil, and retains the surface land or upper seams of minerals, it is presumed that he intends to reserve his Common Law right of support, as otherwise he would not have retained the surface land. Much will, however, depend on the wording of the grant, and the onus of showing that this was not the intention of the parties will be on the purchaser of the subsoil. But if he can show that it is impossible to get the minerals at all, without letting down the upper seam, and if the terms of the grant make it clear that it was the intention of the parties that the subjacent seams should be worked, it is a necessary implication that there should be a subsidence of the upper seams.[2] In such a case, in order to protect

[1] *Blackett* v. *Bradley*, 31 L.J. Q.B. 65.

[2] *Butterley Co.* v. *New Hucknall Colliery Co.*, (1909) 1 Ch. 37.

himself, the owner of land should expressly reserve such support as he requires, in the grant of the subsoil.

Support of Sewers Act.

Under the **Public Health Act, 1875 (Support of Sewers) Amendment Act, 1883,** minerals must not be worked under or within forty yards of sewers, water pipes, buildings, etc., belonging to a Local Authority, without giving them notice: the Local Authority may then give notice to the mine-owner to treat for compensation, specifying the nature and extent of the support they require to be left; the amount of compensation to be determined, in case of dispute, by arbitration. If the Local Authority refuse to take the minerals, the owner is at liberty to work the mine, but he must not do so in any unusual manner, so as to cause damage. This Act only applies to mining districts.

Railway Clauses Consolidation Act

Where land is taken compulsorily for making a railway, under the provisions of the **Railway Clauses Consolidation Act, 1845,** landowners need not, unless they like, part with their ownership of the subsoil and minerals. The Act provides that railway companies shall not be entitled to any mines under land purchased by them, and that subsequent mines shall be deemed to be excepted out of conveyances of land, unless they are expressly conveyed. They may, however, remove such minerals as are met with in the course of construction of the railway. The former owner, or rather, the owner of the mines, must not work within the prescribed distance, or, where no distance shall be prescribed, within forty yards of the railway, without giving the railway company notice of his intention to do so; and if they consider that damage will thereby ensue to the

surface works, they have the option of purchasing such mining rights, and thereby avoiding the risk of damage. If they do not exercise this option, the mine-owner may work the mine in the usual manner of working such mines in the district, but he will be liable for any damage which occurs to the railway owing to his working the mine in an unusual or improper manner.

SUMMARY OF CHAPTER VIII.

1.—An owner of land has a natural right to the support given to his land by that of an adjoining owner.

2.—He has also a right to excavate his land to any extent, provided he does not thereby cause an adjoining owner's land to subside.

3.—There is no right of action until damage has been sustained; and an action must be brought within a period of six years of the suffering of the damage.

4.—There can be no natural right of support to a building by land. Such a right can be acquired as an easement at Common Law, and, if the support is from an adjoining building, under the Prescription Act also.

5.—If a man excavates his land, so as to cause *buildings* on adjoining land to fall, he is not liable to the adjoining owner unless—

(*a*) The excavation is such as would have caused the land to fall if there had been *no buildings* on it; or

(*b*) The adjoining owner had acquired an easement of support to his buildings.

6.—There is an implied grant of support to buildings erected by a purchaser of land, from any land or

buildings retained by a vendor, when the vendor has sold land to the purchaser for "building purposes."

7.—There is an implied reservation of support to a vendor's building when he sells adjoining land.

8.—If a man builds a row of (two or more) houses which afford mutual support to one another, a purchaser of any one house has, by implied grant, a right of support from the other adjoining houses.

9.—There is no natural right of support from underground water; neither can an easement be acquired to prevent one owner from draining away the water from under an adjoining owner's soil.

10.—An owner of a part of a building, such as a flat, has a right to the support afforded by the walls of the building below.

11.—If an owner sells the surface land only, and retains the mining rights, the purchaser of the surface land still has a natural right to the support of such surface land. If an owner of land sells the mining rights, but retains the surface land, it is presumed that he intends to reserve his right of support, unless the owner of the minerals can prove to the contrary.

12.—Ordinary rights of ownership in respect of support are modified to some extent by Acts of Parliament, such as the Support of Sewers Act, the London Building Act, and the Railway Clauses Consolidation Act.

CHAPTER IX.

WATER.

THE principles of the law governing the ordinary rights of an owner of land, in respect of water, are more difficult to apply than in the case of other rights of ownership of land.

NATURAL RIGHTS.

Lake or pond.

In the case of a lake or pond owned by, and entirely surrounded by land belonging to, one person, such person may use the water as he likes. He may, in fact, remove the whole of the water and fill up the empty space, thus causing it to cease to exist as a pond. In like manner he may, *if possible*, deal with a well or spring. The owner of the land has, in the above cases, also a right to prevent any other person from entering his land for the purpose of enjoying the use of the water.

Well or spring.

Any adjoining owner may, nevertheless, *acquire* by grant or prescription an easement in the form of a right to such use, or a *profit à prendre* in the case of such right being one to take fish out of the lake or pond.

Natural rights in water limited.

The law in the above cases appears at first sight easy to comprehend; but if we consider the cases of a stream permanently flowing from the pond or spring, and of the water at the bottom of the well,

as being part of the water passing through a stratum of sand which underlies the land of other people besides that of the owner of the pond or well, we see that—

1. An adjoining owner may have a natural right to a reasonable flow of water in the stream which rises in the pond or spring, and thus be able to prevent the owner of the pond or spring from doing away with it.

2. An adjoining owner has also a natural right to dig a well in his own land, and to obtain water from the same stratum of sand as that from which the first-mentioned well obtained its supply, even though by so doing he may drain the other well dry.

In such ways, therefore, even in these simple cases, a man's natural right to water may be limited.

The most important instances of rights to water are those in which a man owns land *through which* a stream or river passes, and those in which his land *abuts on*, or is bounded by, a stream, river, estuary, or the sea.

Streams and rivers.

An owner of land through which a stream or river passes, or whose land is bounded thereby, is said to be a "riparian owner" (from the Latin *ripa*, a bank), and the rights, which he exercises over the water flowing through or past his land in a natural stream or river, are called "riparian rights." If the stream or river passes entirely through his land the ordinary presumption, failing evidence to the contrary, is, that he owns the whole of the bed as

well as the land on both sides. If it forms the boundary of his land, so that the land on one side of it belongs to him, and that on the other to his neighbour, in the absence of evidence to the contrary, his ownership extends to the centre line of the stream, or, to use the Latin expression, *usque ad medium filum*—to the middle line (or thread).

Where a river is tidal, that is, subject to the ebb and flow of the tide, the bed of such river belongs to the Crown, and the river is a public highway; but that portion of it above the influence of the tide, belongs to the adjoining owners, subject, however, to the rights of passage of the public in boats.

Navigable and tidal rivers.

A river or estuary is said to be "navigable" when the public has a right of navigation over it: that is, a right to use it as a highway for boating, shipping, &c., so that with regard to public rights of passage, the words "tidal" and "navigable," as applied to rivers, are practically synonymous.

The public has, at Common Law, no right of navigation over rivers and streams which are non-tidal, such as the tributaries of larger rivers, even though they are wide enough for navigation, but such a right may be acquired either by long user or by Act of Parliament. When such a right has been acquired by long user, it is simply an acquired right of way, similar to an acquired right of way over land, and is not the same as the right of navigation in the sea, or in a tidal river, which is given to all by the Common Law.

A riparian owner has the same natural rights in a public navigable and tidal river as he has in a private non-tidal river, and, in addition, he has, in

common with the public, the right of navigation over every part of the river independent of his rights as owner of the bed of the stream.

In a public navigable river, however, a riparian owner's rights are controlled to this extent: that whereas in a non-tidal private river it would be possible for all the riparian owners to agree to divert, pollute, or diminish the stream, in a tidal and navigable river the public right of navigation would intervene and prevent this being done. Riparian rights modified by public rights.

The various kinds of natural rights in respect to water must be considered separately.

1.—Natural right to the uninterrupted flow of a natural stream.

Every landowner has a natural right that a **natural stream,** which runs through his land in a defined course, shall continue to flow without diminution or alteration. To distinguish between a **natural** and an **artificial** stream is not always an easy matter. Many natural streams have, for manufacturing or other purposes, been so diverted or altered as almost to have lost their original character; while other streams, originally artificial, have, from age or other circumstances, become in appearance, and every other characteristic, so closely assimilated to natural streams as to be practically indistinguishable from them. The question whether a stream is a natural or artificial one is therefore, in practice, always a question of fact. For general purposes, however, a natural stream may be defined as a stream which rises from a natural source and flows in a natural channel; and an artifical stream, as one Uninterrupted flow.

which has been made by man, or at any rate flows in a channel made by human agency, as, for instance, a canal or a diversion of a natural river.

Although there is no natural right to the uninterrupted flow of an artificial stream, nevertheless, in a case[1] where water from a natural river had been admitted into an artificial channel, about a mile and a-half long, which rejoined the river at its lower end, the origin of the artificial channel being unknown, the Courts held that the proper inference from the user of the water, and from other circumstances, would be, that the channel was originally constructed upon the condition that all the riparian proprietors should have the same rights, including a right to use the water for manufacturing purposes, as they would have had if the stream had been a natural one. And from a judgment in a more recent case, it appears that where water flows through an artificial channel past the lands of several proprietors, to serve the purposes of a proprietor lower down, in the absence of all evidence as to the conditions upon which the channel was originally made, it would be right to presume the grant of an easement or right to the running of water; and, *primâ facie*, every proprietor of land on the banks of such a channel would be entitled to half of the bed of the channel adjoining his land.[2]

Extent of right to uninterrupted flow.

With regard to the extent of the right to the flow of water in a natural stream, the general well-established rule is that every landowner has a natural right to the uninterrupted flow, without diminution, alteration, or deterioration in quality, of the water

[1] *Baily & Co.* v. *Clark, Son & Morland*, (1902) 1 Ch. 649.
[2] *Whitmores* v. *Stanford*, (1909) 1 Ch. 427.

of natural streams passing through his land in defined channels; and also that the flow shall continue unobstructed through his neighbour's land lower down the stream, since an obstruction would cause the stream to flood. This natural right, like others, may be suspended or modified by the creation of easements at variance with it: for instance, a riparian owner above, might have acquired an easement to divert or use more than a reasonable quantity of the water; or an owner below, might have acquired an easement to dam up the stream, and so retard its flow.

"The right to the use of water," said Sir John Leach in *Wright* v. *Howard*,[1] "rests upon clear and settled principles; *primâ facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water that flows in a stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, or throw the water back upon the proprietors above. Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operation, or must prove an uninterrupted enjoyment of twenty years."

[1] Sim. and Stuart 190.

2. Natural right to the use of water.

Every riparian owner has a natural right to the reasonable use of the water running in a defined and natural stream through his land, for agricultural or manufacturing purposes, or for other purposes connected with the use of his tenement. But he has no right to obstruct the flow, nor to pollute the water, nor to use more than a reasonable quantity.

Right to appropriate a reasonable quantity.

The question will naturally occur—What is a reasonable amount? For instance, where a large estate has a small frontage to a river, would the owner be entitled to take as much of the water as was necessary for the proper irrigation of his land? The quantity might be reasonable from the point of view of the necessities of his land, but the meaning of the word "reasonable" in respect to the quantity of water does not extend so far, and is limited to this: Is the amount of water taken such that the natural rights of the other riparian owners are not materially affected? or, in other words, Is the benefit or advantage, which an adjoining owner lower down the stream derives from being a riparian owner, decreased? If such benefit or advantage is so decreased, then the taking of the water is in excess of the natural right thereto, and a trespass or infringement of such right is committed.

The law on the subject of a riparian owner's natural right to take and use the water from a stream has been very clearly laid down as follows:—"By the general law applicable to running streams, every riparian owner has a right to what may be called the ordinary use of the water flowing past his

land: for instance, to the reasonable use of water for his domestic purposes and for his cattle, and this without regard to the effect which such may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be considered the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."[1]

No grant can be made affecting interest of a third party.

A riparian owner can only, *as against himself*, make a grant to a person who is not a riparian owner of a right to use the water of a stream: and any user by such non-riparian owner is wrongful if it sensibly affects the flow of water through, or past the lands of *other riparian owners*.

Underground Water.

Natural defined underground streams.

There are many cases of **natural streams running underground,** which are not of the nature of percolating water, but are actual streams running in naturally formed channels, as, for instance, a stream running through an underground cave.

The natural rights to the flow and to the use of water in natural streams running in defined courses on the surface, apply also to **natural streams running in known and defined courses**

[1] *Miner* v. *Gilmour*, 12 Moo. P.C.C. 156.

Percolating water

underground, but **not** to natural streams **percolating** underground **in unknown, undefined courses,** such as water to a well. A man has a right to sink a well in his own land, and obtain as much water as he pleases; or he may dig deep foundations for a building and pump out the water met with, even if he thereby seriously diminishes the supply of water to the springs and wells of his neighbours, or even drains them dry. The only remedy for the adjoining landowner consists in sinking deeper wells, and using pumps and mechanical appliances on his own land to enable him to get back the water. There is **no natural right to such water percolating in an undefined and unknown course;** neither can any right to it be acquired by prescription. Every landowner is entitled to get water out of the soil, and use any quantity of it, regardless of his neighbours' interests. He must not, however, pollute percolating water. For instance, where a man turned sewage into his well, and thereby polluted the water percolating to his neighbour's well, he was held liable in an action brought against him by his neighbour, although until the latter appropriated it he had no property in the water percolating under his land.[1]

No natural right to pollute percolating water,

nor to appropriate it if such act interferes with a defined stream.

There is one exception to the rule that a landowner may draw off any percolating subterranean water, and that is, when the effect of so doing is to draw off water flowing in a defined surface stream through adjoining land. Lord Chancellor Hatherley stated the law on this point, as follows:—"I do not

[1] *Ballard* v. *Tomlinson*, 29 Ch.D. 115.

think any case has decided more than this: that you have a right to all the water which you can draw from the different sources which may percolate underground, but that has no bearing at all on what you may do with regard to water which is in a defined channel and which you are not to touch. If you cannot get at the underground water without touching the water in a defined surface channel, I think you cannot get it at all. You are not by your operations, or by any act of yours, to diminish the water which runs in this defined channel, because that is not only for yourself, but for your neighbours also, who have a clear right to use it and have it come to them unimpaired in quality and undiminished in quantity."[1]

Diversion of Streams.

Owner may divert stream.

Where a natural stream passes entirely through the land of an owner, so that he owns the land on both sides of the stream, he may divert the stream, provided that it is returned to its original natural course before leaving his land, and provided he does not thereby interfere with a lower riparian owner's natural right to the uninterrupted flow of the stream, and provided only a reasonable quantity of the water is taken from the stream.

3. Natural right to purity of water.

Every owner of land has a natural right that all water passing in a natural course over his land, whether in a defined natural surface stream, or

[1] *Grand Junction Canal Co.* v. *Shugar*, L.R. 6 Ch. 483.

trickling over, or percolating through his land in an undefined course, shall continue to flow in its naturally pure condition.

In the leading case on the question of the natural right to purity of water,[1] the action was brought against a firm of worsted-spinners and wool-combers at Bradford, for having, in the course of their business, poured soap-suds, wool-combers' suds, and other refuse matter into a natural stream, the water of which flowed from their premises to the plaintiff's mills. It was proved that many other manufacturers had drained filthy matter into the stream, and that the Bradford sewers also discharged themselves into the same place, so that the damage actually caused by the defendants was imperceptible: but it was held that the plaintiffs had suffered damage in point of law, because they had a right to have the stream flowing through their land in its natural state as an incident to the property in the land through which the watercourse flowed, and that the right continued notwithstanding the pollution from other sources.

4. Natural right to dispose of surface water.

Every owner whose land is flooded, or through which water has soaked and collected, has a natural right to get rid of such water by letting it take its own course, or by draining it off in trenches, &c., and a neighbouring proprietor cannot complain that he is thereby deprived of such water, which otherwise would have come to his

[1] *Wood* v. *Waud*, 3 Ex. 748.

land, or that his land is thereby flooded. This right may, of course, be modified by some grant or agreement at variance with it.

He may also use or divert any water flowing over or soaking through his land in an undefined course, which, if allowed to continue to flow, would collect and go to form a natural stream.

EASEMENTS IN WATER.

The Law of Easements in respect of water is generally the same, whether the streams be natural or artificial.[1] Easements can also be acquired in ponds, tanks, wells, and other collections of water which have no flow, or no appreciable flow.

The following easements may be acquired in water:—

1. **A right to obstruct or divert a natural stream, to the detriment of riparian owners above or below the obstruction.**
2. **A right to take and use more than a reasonable quantity of water from a stream.**
3. **A right to pollute water in a natural or artificial stream.**
4. **A right to the accustomed flow of water in a permanent artificial stream.**
5. **A right to take water from a permanent artificial stream.**
6. **A right to the accustomed flow of water in a temporary artificial stream (such as water pumped from a mine) as**

[1] *Magor* v. *Chadwick*, 11 A. & E. 571.

against other riparian owners, so long as the stream continues to flow, but not as against the originator of the stream.

Acquisition of easements in water.

Easements in water may be acquired by express or implied grant. They can only be acquired by prescription when the stream runs in a defined course, and, if an artificial one, is of a permanent character.

The extent of an easement in water by grant will, of course, depend on the wording of the grant.

Twenty years' enjoyment will give a *primâ facie* right to an easement in water, and forty years' enjoyment an absolute right under the Prescription Act, or the easement can be claimed by prescription at Common Law.

1. Easement to obstruct or divert a natural stream.

Right to obstruct

Every owner of land has a right to erect structures to prevent a stream from flooding his land, provided he does not thereby interfere with the natural rights of other owners. He may, however, after twenty years' enjoyment, acquire an easement to dam a stream for other purposes; as, for example, to provide a head of water for working a mill; even if he thereby interferes with the natural right to the use of the water by other riparian owners. Or a right may be acquired to throw back upon the land of proprietors higher up the stream the water which would otherwise, by gravity, pass from it; or to discharge the water upon the land lying lower down the stream, either

deteriorated in quality, or with a degree of force greater or less than the natural current; or he may, after twenty years, acquire a right to divert a stream for irrigating his own land, even if the natural flow of the stream is thereby considerably diminished.

or divert stream.

2. Easement to take and use more than a reasonable quantity of water.

This right may be acquired by prescription, but is seldom acquired by grant, since so many different riparian owners would be affected. For instance, suppose there were twelve riparian owners who would be affected by the excessive quantity of water being taken, and the owner desiring the privilege obtained grants from eleven of them, his right would still be imperfect, as he would commit a trespass if he interfered with the natural right of the twelfth owner.

The extent of such a right to use more than a reasonable quantity of water would be measured by either the terms of the grant, or, if acquired by prescription, by the extent of the excessive user at the beginning of the prescriptive period.

It is also possible for such a right to be acquired by custom by the inhabitants of certain localities.

3. Easement to pollute water in a natural or artificial stream.

The natural right to the purity of water in a natural stream may be lost by the acquisition by another person of an easement to pollute the water higher up the stream.

Such a right may be acquired by grant, or by prescription at Common Law, or under the Prescription Act; but, if acquired by grant, the easement

will, of course, only affect the rights of the grantor, and not those of other riparian owners, who would still have their remedy against the person causing the pollution.

No easement to pollute a stream can be acquired by prescription, except as against other riparian owners: and if the pollution is so great as to cause a nuisance to the public at large, no easement can be acquired.

Extent of Easement to Pollute Water.

The extent to which the dominant owner may pollute water in a stream is difficult to determine. No hard and fast line can be drawn, but the extent of the pollution must be calculated on an approximate basis, either by chemical analysis or by consequential injurious results.

If the easement is acquired by express grant, the extent will, as in other grants, be governed by the terms of the grant; if by implied grant, by the circumstances under which the implication arises. For example, if an owner grants land for the purpose of erecting a soap factory, there would be an implied grant, *as against the grantor*, for the purchaser to pollute the water of the grantor to the extent usual in carrying on the manufacture of soap in a proper manner.

Degree of pollution.

There has always been considerable uncertainty as to the **degree of pollution** allowed when the easement has been acquired by prescription. During the prescriptive period the amount of pollution is almost certain to have varied considerably. It has, however, been settled that the degree of pollution

to which a person who acquires the easement by prescription is entitled, is that which existed at the commencement of the prescriptive period.

Manufacturers who cause or permit the flow of polluting liquids through a sewer into a stream, without taking means to render the liquid innocuous, are guilty of an offence under Section 4 of the Rivers Pollution Act, 1876, and are not protected by any prescriptive right arising from long user of the sewer for this purpose before the Act of 1876, which creates the offence.[1]

It may here be remarked that if an easement to pollute water exists (and it is the same in the case of easements to pollute air), the fact gives no right to anybody to add to the pollution, or in any way to participate in the benefit of such easement.

4. Easement to the accustomed flow of a permanent artificial stream.

The term **permanent artificial stream** may be applied either to water running on the surface in an artificial cutting, such as a ditch or canal, or to water running underground in a culvert or pipe.

In the case of permanent artificial streams of known origin, constructed on a neighbour's land, any right to the flow of water must depend on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin, since there is **no natural right to**

[1] *Butterworth* v. *West Riding of Yorkshire Rivers Board*, (1909) A.C. 45.

the accustomed flow of a permanent artificial stream. But, as previously stated, if the origin of the stream is unknown, the riparian proprietors have the same rights as they would have if the stream had been a natural one. The same is the case if the artificial stream is a diversion of a natural stream, or where several small natural streams are collected into one artificial cut or channel.

An easement to the uninterrupted flow of a permanent artificial stream can be acquired, after twenty years' enjoyment, against both the originator of the stream and also against any person through whose land the water flows.

In considering the question of a presumed grant, it is necessary to review the whole of the surrounding circumstances, *e.g.*, the purposes for which the artificial watercourse was originally made, the burden of its maintenance, and similar considerations; and with regard to the question of prescription, it is material to ascertain whether the stream was constructed for a temporary purpose, as if this is so, no easement can be acquired against the originator of it.

5. Easement to take water from a permanent artificial stream.

This right can be acquired after twenty years' user, or by grant.

There is, of course, **no natural right** to take the water; and if the riparian owner has no easement to have the flow of water continued, he cannot claim as an easement the right to take any of the water, if and when it is flowing in the stream.[1]

[1] *Whitmores* v. *Stanford*, (1909) 1 Ch. 427.

At the same time, owners have a proprietary right to take the water which comes on their land from an artificial source, such as water pumped from a colliery, while it remains on their land; and riparian owners lower down the stream, until they have acquired an easement, cannot prevent them doing so, even though the whole of the water be consumed. In a case on the point[1] it was said: "The proprietor of the land through which the Bowling Sough flows has no right to insist on the colliery owners causing all the water from their works to flow through their land. These owners merely get rid of a nuisance to their works by discharging the water into the Sough, and cannot be considered as giving it to one more than another of the proprietors of the land through which that Sough is constructed. Each may take and use what passes through his land, and the proprietor of the land has no right to any part of that water until it has reached his own land. He has no right to compel the owners above to permit the water to flow through their land for his benefit, and consequently he has no right of action if they refuse to do so." Water from a colliery.

6. Easement to the accustomed flow of a temporary artificial stream, as against other riparian owners.

Needless to say, there can be **no natural right** to the accustomed flow of a temporary artificial stream, and no easement can be acquired by prescription against the originator of the stream, since the temporary nature of the stream precludes the presumption of a grant of a permanent right, and a precarious easement is

[1] *Wood* v. *Waud*, 18 L.J.Exch. 305.

unknown to law. A right to the water of such a stream could, of course, be acquired against the originator, by express grant. An example of a temporary artificial stream would be one caused by the water pumped from a colliery: so also a watercourse, constructed for the purpose of driving a mill, would be a temporary artificial stream.

"Temporary."

"Temporary," as a legal term, does not mean merely that a thing happens to last, or is intended to last, for a few years only. It means that a thing may, within the reasonable contemplation of the parties, be expected to come to an end some day sooner or later, and that it is not of the nature of a grant in fee simple.[1]

No easement against originator.

However long a temporary artificial stream may have been used by the person through whose land it flows, no prescriptive right will be acquired which will compel the originator to continue to employ the artificial means necessary for the production of the stream.

An easement may, however, be acquired by an owner, through whose land a temporary artificial stream passes, *against other owners* through whose land the stream flows after it leaves the land of the originator. The law is clear that, between *persons other than the originators*, easements may be acquired by grant, or, after twenty years' enjoyment, by prescription, to the flow, use, and purity of the water in the temporary stream, so long as it continues to flow.

Pollution of artificial stream.

The lower riparian owners would, of course, have a right to prevent either the originator or any person

[1] *Burrows* v. *Lang*, (1901) 2 Ch. 502.

through whose land an artificial stream flows, from so using the stream as to cause a nuisance by polluting it. It seems that the mere appropriation of the water in an artificial stream, for a purpose of utility, is sufficient to confer a right on the person who so appropriates it, that the water shall not be polluted to his detriment by anyone who has not acquired an easement to so pollute it; since the pollution of a stream involves a nuisance to the land through which it flows, and a trespass, by sending impure matter on to the soil of the lower riparian owner. This right would, in fact, be infringed long before the pollution became a nuisance, as, for instance, where the water of an artificial stream has been appropriated and was formerly pure enough to be usable for ordinary farming purposes, but was afterwards rendered unfit for cattle to drink. Such a result might ensue by a degree of pollution which would still fall short of being a nuisance in the ordinary sense of the word.

Pollution need not amount to a nuisance.

Tow Paths.

A tow path does not, as a matter of course, exist by the side of every public river; but where there is one, it includes so much of the banks as is necessary and proper for the towing of barges. There is not necessarily any public right of way except for the purpose of towing; neither has the public any Common Law right to tow on the banks of ancient navigable rivers.[1]

[1] *Ball* v. *Herbert*, 3 T.R. 253.

The Seashore.

Although, strictly speaking, no *easements* can be acquired over the seashore or foreshore, certain rights may be enjoyed by *custom*.

Belongs to Crown.

The seashore or foreshore is that space of land which is covered by the sea at high tide, and uncovered at low tide. In the absence of evidence to the contrary it belongs to the Crown, and is under the management of the Board of Trade; but it may belong to the lord of the manor, when it has been granted to him or his predecessors by the Crown.

In many seaside towns the Local Authority has control over the beach and foreshore by virtue of Act of Parliament, and can make bye-laws in respect of them, subject to the approval of the Local Government Board. The Local Authority may, also, buy the foreshore from the lord of the manor, when it is owned by him.

Public rights.

At high tide the public have a right of passage over the foreshore, in boats, and also of fishing, in the same way as they have over the rest of the sea; but it has been held that there is no general right of landing or embarking at any part of the shore except in cases of peril or necessity. Neither has the public any Common Law right of access to the sea over any private part of the shore, for the purpose of bathing or amusement, since the sands of the seashore are not to be regarded as a highway in the full sense of the word.

The right of fishermen to beach their boats, and to draw them up above high-water mark depends upon evidence of a special custom or prescription in each case.

An owner of the foreshore may not dig away the soil of the foreshore in such a way as to expose adjoining land to the inroads of the sea, but he is under no obligation to protect his neighbour if the foreshore is washed away by the sea.

Rights of Fishing.

The sea and tidal rivers.

Every subject of the realm has a right to fish in the sea, and in the tidal portion of navigable rivers the bed of which belongs to the Crown. Individual subjects or corporate bodies may, however, have exclusive rights of fishery in certain arms of the sea, and in navigable rivers, by grant from the Crown.[1]

Non-tidal rivers.

In non-tidal rivers and streams the riparian owners have, *primâ facie*, the right of fishing on their respective sides of the stream, and the right may be presumed to extend from the bank to mid-stream; but there may be **"free fishery,"** which is a privilege, formerly granted by the Crown, entitling a man to the exclusive right of fishing in a public river. Grants of this kind cannot now be made, having been prohibited by the Magna Charta, but those already in existence hold good.

A **"several fishery"** is the exclusive right of an individual to fish, derived through or on account of ownership of the soil. It is, however, a question whether a person who does not own the soil can acquire a several fishery.

A right to fish in another man's stream or pond is a *profit à prendre*, and not an easement.

[1] *Carter* v. *Murat*, 4 Burr. 2164.

Sea and River Walls.

Liability to repair.

An individual, corporation, or locality may be liable to repair a sea wall by prescription or custom, for the protection of adjoining land. For instance, where previous owners of the estate have from time immemorial repaired the sea wall, the present owner will be bound to continue to do so by prescription. The ordinary liability of an owner in such a case is confined to keeping the wall in a sufficient state of repair to resist the effect of an *ordinary* storm: but evidence may be given to show, further, that such owner is liable by prescription to repair sea walls, even though destroyed by an *extraordinary* storm.

The burden of proving such further liability lies on the Commissioners of Sewers, who, in the absence of such proof, must make a rate upon the whole "level" (*i.e.*, the district under their control) to defray the cost of repairing damage done to a sea wall by an extraordinary storm.[1] It may be explained that Commissioners of Sewers are the persons appointed to superintend the repairs of banks and walls of the sea coast and navigable rivers, or, with the consent of a certain proportion of owners and occupiers, to make new ones: they also have power to cleanse rivers and streams. Their jurisdiction is limited to the county, district, or level named in the commission by which they are appointed; and they have power to assess rates upon the owners of land within their district, to cover the cost of work carried out under their direction.

Commissioners of Sewers.

[1] *Reg.* v. *Fobbing Commissioners*, 11 App. Cas. 449.

Where there is a custom in the locality that all owners whose lands abut upon the sea shall do the repairs, those who have lands fronting the sea wall will be liable by custom. Local custom

Apart from prescription or custom, owners of lands fronting the sea are under no liability at Common Law to repair sea walls; and the fact that an owner of sea frontage has always repaired the sea wall by which his property is protected, is in itself no evidence of his liability to repair, either by prescription or by reason of his tenure. It has been held that a landowner who failed to repair a sea wall, so that, owing to an extraordinary high tide, the sea came over it and flowed over his land and on to that of his neighbour, was not liable at Common Law, apart from prescription, for the damage done to his neighbour's land; and there was not sufficient evidence to establish a prescriptive liability on him to maintain the wall, not only for his own protection, but for that of the adjoining landowners as well. Such a liability cannot, however, be an easement, as it requires the servient owner to do something for the benefit of the dominant owner; and this is contrary to the character of an easement. No liability at Common Law.

A man occupying land adjoining the sea may erect such defences as are necessary for the preservation of his own land from the inroads of the sea, even if, by so doing, he renders it necessary for his neighbours to erect similar defences to protect their land from being washed away. Still, in the case of embankments by the side of a river, whether tidal or non-tidal, if the riparian owner erects an Owner may protect his land from the sea.

embankment against the river, he must take care that in so doing he does not injure the property of the adjoining, or opposite, proprietors.[1]

River Conservancy Boards, Harbour Boards and other Authorities are by their respective Acts of Parliament authorised to variously deal with and control the banks of navigable and tidal rivers.

EASEMENTS OF DRAINAGE.

As already explained, every landowner has a natural right to dispose of surface water, or water resulting from floods, by allowing it to drain away on to his neighbour's land. But if by reason of certain works on his land the normal accumulation of water is in any way thereby increased, there is no natural right to impose upon his neighbour the burden of carrying off such extra amount of water over his land. So that, if an owner desires, for convenience or for sanitary reasons, to collect all his surface water into one defined and particular channel, or to get rid of his sewage in this manner, he will find he has no natural right to discharge such abnormal quantity or quality of water on to his neighbour's land. He may, however, acquire an easement to do so after twenty years.

Such an easement would probably be in the character of a right to pass such accumulated surface water or sewage, by means of drain pipes, through his neighbour's land to a sewer or stream.

Rainwater

A common example of an easement of drainage is where an owner of a house has the right of passing

[1] *Att.-General* v. *Lonsdale*, 38 L.J. Ch. 335.

the rainwater off his roof, along the eaves-gutter of his neighbour's house, or down a neighbour's rain-water pipe.

A few examples will perhaps explain more clearly the nature of easements of drainage, and the manner in which they may be acquired.

Surface water.

Suppose a man wishes to accumulate his surface water (which he had not previously done) into a defined channel, and to discharge it over or through his neighbour's land. He may obtain such an easement by express grant from his neighbour, or, after so discharging the water for twenty years, by prescription. And where a man has two fields or houses, and has drained his surface water or sewage from one field or house over or through the other, then, if he sells the upper field or house, he impliedly grants to the purchaser the same convenience of drainage which he enjoyed while the two fields or houses were in his sole ownership.

On the other hand, should he sell the lower field or house and retain the upper one, there would be no implied reservation of the existing means of drainage, if it were only a convenience, and not a necessity. This is another illustration of the rule that if a vendor wishes to retain any privilege which he has previously enjoyed over the premises which he sells, he must, except where such privilege is an absolute necessity, expressly reserve it in the conveyance.

Projecting eaves.

An easement may be acquired by prescription to allow the rainwater from projecting eaves to drip on to the land of an adjoining owner.

Extent of Easement of Drainage.

The extent of an easement of drainage is measured in the same way as other easements. If the right has been acquired by express grant, the extent is limited by the terms of the grant: if by prescription or implied grant, it is restricted to the amount of drainage facilities enjoyed at the beginning of the prescriptive period, or during unity of ownership, respectively. Any material increase of burden on the servient tenement justifies the servient owner in resisting or obstructing the increase, or, if this is impossible, he may obstruct the easement altogether.

Servient owner need not repair.

As in the case of other easements, there is no liability on the owner of the servient tenement to do any repairs in order to enable the dominant owner to enjoy his privilege, but he must allow the dominant owner to come on his land for the purpose of repairing or cleaning any drain or watercourse, &c.

SUMMARY OF CHAPTER IX.

1.—Natural Rights can only appertain to water *naturally* existing on, or flowing over, or through land. There is no natural right to a supply of water percolating through land. Natural rights in water may be—

(*a*) to uninterrupted flow of a natural stream;

(*b*) to appropriation of a reasonable quantity;

(*c*) to divert a stream passing through one's land, provided the stream leaves the land as heretofore:

(*d*) to purity of water passing through one's land (including percolating water);

(*e*) to dispose of surplus water by causing it to flow on to the land of a neighbour.

2.—EASEMENTS IN WATER may be acquired—

(*a*) to take water from a pond or well on a neighbour's land;

(*b*) to obstruct or divert a natural stream;

(*c*) to appropriate more than a reasonable quantity from a stream;

(*d*) to pollute a stream;

(*e*) to accustomed flow in a permanent artificial stream;

(*f*) to appropriate water from a permanent artificial stream;

(*g*) as against other riparian owners, to accustomed flow in a temporary artificial stream, but not as against the originator.

(*h*) to drain off water by discharging it through a gutter or pipe belonging to an adjoining owner.

3.—Easements in water are limited in cases where they would tend to interfere with the rights of the public therein.

4.—THE FORESHORE belongs to the Crown, unless it has been granted to the lord of the manor.

5.—The public has a right to fish in the sea and tidal rivers, but not in non-tidal rivers and streams, unless acquired as against the riparian owners, who have the *prima facie* right. A "free fishery" cannot, since Magna Charta, be granted by the Crown. A "several fishery" is the exclusive right of an individual, through or on account of ownership of the soil.

6.—An owner of land abutting on the sea is not bound to keep a sea wall in repair, even though his neglect to do so cause the destruction of other people's property, unless such others have acquired the right to protection by grant, prescription, or custom. Such right is, nevertheless, not an easement.

7.—A dominant owner has the right to enter the land of a servient owner for the purpose of repairing the pipe or channel through which he discharges water. The servient owner is not liable to do repairs himself.

CHAPTER X.

Rights of Way.

Every owner of land has a proprietary right to use his land without interference from others. If another person were to walk over the land of such owner, he would interfere with this proprietary right. The owner of the land may prevent him from trespassing, by erecting fences, or by bringing an action at law against the trespasser. Interference with proprietary rights

Suppose A, an owner of land, grants to B a right to walk over his land; he thereby deprives himself of many proprietary rights. For instance, A loses his right to erect buildings which might interfere with the privilege granted. A would be liable to be sued for damages if he dug pits in the part of his land over which B is entitled to walk, and into which B accidentally fell. B, moreover, may walk over A's land, even though by so doing he causes damage to crops planted by A in the land over which he (B) is entitled to walk. Many other proprietary rights of an owner are, in fact, interfered with when he grants to some other person, or such person acquires, a right of way over his land.

A right of way is not, like other easements, an abridgment of a natural right, but is an abridgment of a landowner's proprietary right, given him by law, of excluding other persons from his land.

The term "Right of Way" is applied only to a *right of passage*, and does not include any other privilege (such as allowing cattle to graze while passing over land).

License of way

A Right of Way may be granted to an individual who does not own land. Such a right is a **license**; it does not extend to the licensee's friends, and it ceases to exist on the death of the licensee, as explained in Chapter II.

Public right of way.

A Right of Way may be granted or dedicated to the public. Such a right is not an easement, but a **public right**.

Easement of way.

A Right of Way may be granted to, or acquired by prescription by, an owner of land, so as to benefit such owner of land and thereby increase the value of his property. Such a right is an **easement**.

All ways are divided into highways and private ways. The term "Right of Way" strictly means a private right of way; that is, a privilege which an individual, or a particular description of persons, may have of going over another's ground.

Such a right arises either by license or is acquired as an easement: if the latter, the right can only be enjoyed as accessory to the dominant tenement.

Difference between public and private right of way.

There is an important difference between a public and a private right of way. A landowner may make an opening in his fence and go into a public road at any part of the length of the road, or at the end; but in a private road, in the absence of any special agreement, the owner of a right of way can only enter the road at the usual or accustomed end. For instance, if a private way to a field is by the side of the field, the dominant owner is not entitled to alter

the position of the gate through which he has been accustomed to pass from the field to the way, and to make a new entrance at a fresh place.

Public rights of way (as stated above) are not easements, although they are sometimes erroneously so termed. The law as to public rights of way will not be considered here at any great length. They are highways, and every member of the community is entitled to use them for the purpose of going from one place to another, irrespective of the ownership of land. A highway is defined as "a public passage for the Sovereign and all his subjects," and it is commonly called the King's public highway. Formerly, besides the ordinary highways, there were turnpike roads, which were roads maintained out of tolls paid by passengers, and which were created and regulated by Acts of Parliament, and placed under the management of Trustees or Commissioners. Highways.

A public right of way can only be created by Act of Parliament, or by dedication, either express or presumed, by the owner of the soil, of a right of passage over the land, to the public at large. A dedication will be presumed if a person form a street on his own land, and does not erect any gate or impediment, and if the road is used as a highway by the public at large. If free and uninterrupted use of a path or road by the public for a considerable period can be shown, this will be strong evidence of an intention to dedicate, on the part of the owner of the soil, unless there is evidence that such dedication is impossible. How public right of way acquired.

There is no rule, as is sometimes supposed, that twenty years' user establishes a *public* right of way, although that length of enjoyment will establish a *private* right of way.

Dedication to the public use does not make the dedicating landowner liable to keep the road in repair, unless he is required by the Local Authority to make up the road under the Public Health Act, 1875, or under the Private Streets Works Act, 1892; and when once this has been done, the Local Authority takes over the road and keeps it in repair. It is also the duty of the Local Authority to repair any ancient highway which existed prior to the Highways Act, 1835.

Every owner of land adjoining a public highway or a navigable river (the latter also being considered a highway) has a right of access to such highway or river from his land at any point he pleases.

Closing of private roads.

In order to prevent the acquisition by the public of a public right of way over a private road (such as an approach to a railway station, belonging to the railway company) it is usual to close such road at least once a year. As the reader may have observed the day often chosen by railway companies for doing so is Good Friday. If the railway company were able to prove that the road had been thus closed every year, it would show that there was no intention on their part to dedicate the road to the public.

Private ways.

A private right of way is a right belonging to a particular individual or to a body of persons (such as the tenants of a certain block of houses) to go over the land of another, either for the purpose of passage generally, or for the purpose of passing to or from a particular tenement belonging to him or them.

Neither a public nor a private right of way gives any right to the land over which the right exists, nor to any corporeal interest in the land. The soil does not become the property of the owner of the right of way; and as long as he is not prevented from enjoying the easement, he cannot claim to prevent the owner of the land doing what he likes with the soil which is his own; neither has he any right to complain of, or interfere with, any other person, whatever he may be doing, even though it be an unlawful act or a trespass against the owner of the soil. It has been said, "The owner who dedicates to public use as a highway a portion of his lands, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith, and the appropriation made to, and adopted by, the public of a part of the street to one kind of passage, and another part to another, does not deprive him of any rights, as owner of the land, which are not inconsistent with the right of passage by the public." [1]

Only give a right of passage.

A private right of way may be acquired by grant, express or implied, or by prescription.

When a private right of way is acquired by express grant or reservation (an example of which was given in Chapter III), the extent of the right will be governed by the wording of the deed. For instance, where a mine owner sold land and reserved a "waggon or cart road" for his own use, it was

[1] *Vestry of St. Mary Newington* v. *Jacobs*, L.R. 7 Q.B. 47.

held that he was not entitled to lay down a railroad or tramway for the carriage of coal from neighbouring collieries belonging to him.[1]

Way of necessity

Easements of necessity have been previously referred to, and of this particular class of easement one very frequently met with is a way of necessity.

A **way of necessity** is one which arises by operation of law, where a person grants to another a piece of land which can only be reached by passing over other land belonging to the grantor. A right to cross such land is impliedly given to the grantee, though only for so long as the absolute necessity lasts. So that, if the grantee is enabled at any future time to reach his land by other means, the easement ceases. This is explained in Chapter IV, in which examples of ways of necessity are given.

In the event of disputes arising between a lessor and lessee as to the right to a way of necessity, the question to be decided is whether the easement was, at the time of granting the lease, necessary for the fair and reasonable enjoyment of the premises which are let, and it seems that the acts of the parties are evidence of what was necessary for such enjoyment.[2]

Another example of the acquisition of a right of way by implied grant, is when the land to which a right of way is attached is sold to two or more persons. In such a case the right becomes appurtenant by implied grant to each portion sold,

[1] *Bidder* v. *North Staffs. Railway Co.*, 4 Q.B.D. 412.
[2] *Geraghty* v. *M'Cann*, 6 Ir.R. C.L. 411.

provided that such distribution of the easement is not at variance with the actual or presumed grant under which the right has been acquired.

ACQUISITION BY PRESCRIPTION.

Twenty years' enjoyment of a way over the land of another gives a *prima facie* right, and forty years' enjoyment an absolute right of way, in the same manner as other easements. Under the Prescription Act the user must have continued until the commencement of the action, and the respective periods are subject to the deductions provided in Sections 7 and 8.

Extent of Right.

Extent of right.

It will frequently happen that disputes arise between the dominant and servient owners, as to the limit of the burden which the owner of the right of way is allowed to place upon the owner of the land.

Depends on how easement acquired.

This question depends to a certain extent upon the manner in which the easement has been acquired. As already stated, if the right is acquired by express grant, then the terms of the grant determine the extent of the right. For example, the use of a way may be limited to certain days or hours of the day, to the owner and certain specified persons, or to foot passengers only. On the other hand, the easement may be general; that is, usable for all purposes connected with passing to or from the dominant tenement.

Unless clearly specified to the contrary, a grant of an easement of way to a person extends to all

licensees of the grantee, including his family, servants, and guests, even though licensees are not expressly mentioned in the grant.[1]

Again, the extent of the right may be clearly defined as to its position, width, direction, &c. If there be no such description, a grant of a right of way does not necessarily mean over a defined track, nor from any one particular point to another.

Limit to way of necessity.

In the case of a way of necessity, the extent of the right is limited by the purpose for which it was necessary. Thus, if the way of necessity led to a dwelling house, it would be only usable for ordinary purposes of access to a dwelling house; and if the owner of the house changed it into a factory, he would have no right to build a light railway along the way.

Proof of an ordinary right of way to a shed will not imply a right of way to a house built afterwards on the same site. A right to carry coals would not necessarily include a right to carry other things, and *vice versâ*: and a right to drive pigs has been held not to include a right to drive horned cattle.

In a recent case,[2] where a "tube" railway company having purchased two houses, the backs of which abutted on a private passage which was used by the adjoining occupiers for the purposes of their business, afterwards constructed a station having an entrance for passengers from the passage into the station, thereby interfering with the user of the

[1] *Baxendale* v. *N. Lambeth Club*, (1902) 2 Ch. 427.

[2] *Milner's Safe Co.* v. *G.N. and City Railway Co.*, (1907) 1 Ch. 208.

passage by the other occupiers, it was held that, this was a user in excess of, and different from, that for which the passage-way was intended, and the railway company were restrained from using it.

Access to land other than dominant tenement.

A private right of way can only be used for the purpose of going to and from the land to which the right is attached, and cannot be used for access to other land, except to reach a highway, nor can the right be assigned apart from the land. The dominant owner cannot, therefore, make a mere colourable use of the dominant tenement. For instance, he cannot, in order to get the benefit of a right of way for carrying building materials to ground (adjoining the dominant tenement) on which he is building a number of cottages, carry them first to the land to which the right of way is attached, and, having deposited them there, subsequently move them to the land on which he is building.[1]

When user gradually increased.

When the easement has been acquired by prescription, the extent of it will be determined by the accustomed user. And if from the extent of user having been gradually and imperceptibly increased, it is impossible to measure definitely the extent of the user at the date of its commencement, no easement can be acquired.

The dominant owner must not exercise his right of way in a manner which will produce unnecessary inconvenience or injury to the owner of the servient tenement, and the right cannot be extended so as to increase the burden or restriction placed by it on the servient tenement.

[1] *Skull* v. *Glenister*, 33 L.J. C.P. 185.

If way becomes impassable.

If a way become impassable owing to the act of the servient owner, the dominant owner will be justified in passing over *other land* belonging to the servient owner, provided the act of deviation is reasonable: but when a way had become impassable owing to a river having overflowed, it was held that the dominant owner had no right to trespass on other land of the servient owner.

Repairs to right of way.

With regard to the **repair of a private right of way,** it is contrary to the nature of an easement that the servient owner should be obliged to *do anything* for the benefit of the dominant owner. He is only bound to *submit to some definite use* of his land. He can, of course, be compelled to remove any obstruction which interferes with the enjoyment of the right of way, but he is under no obligation to repair a path in order to enable the dominant owner to enjoy his privilege. All that the servient owner is compelled to do is to allow the dominant owner to come on his land and repair the path himself, if he chooses to do so.

If there exists a public right of way, no private right of way can be acquired over the same road. If a person has a private way, his right is not necessarily extinguished if the public also acquire the right to use the same road, and it would continue to exist in the event of the public giving up their right.

With regard to the acquisition of rights of way by a body of persons, in a recent case[1] the Courts held that the regular usage for over twenty years of a way

Churchway.

to a church by the inhabitants of a parish, is sufficient

[1] *Brocklebank* v. *Thompson*, (1903) 2 Ch. 344.

to warrant the finding of the existence of immemorial custom; and in the absence of proper evidence limiting such usage to a particular class of parishioners by virtue of manorial custom or otherwise, the right will be deemed to be for the benefit of the inhabitants of the parish generally, to enable them to go to their parish church. Any person entitled to the benefit of the custom would be entitled to an injunction to prevent the blocking up of the church-way by the owner of the estate through which it passes.

SUMMARY OF CHAPTER X.

1.—A Right of Way differs from other easements in that it is an abridgment of many proprietary rights and not of a natural right.

2.—Public Rights of Way are not easements, because they are not enjoyed by persons as owners of land.

3.—Public Rights of Way may be created by Act of Parliament, or by express or presumed dedication by an owner of land.

4.—A Right of Way (public or private) is confined to a right of passage only, and does not include ownership of the soil.

5.—A Private Right of Way granted to a person, irrespective of such person's ownership of land, is a license only, and is therefore granted only to the licensee.

6.—A Private Right of Way, granted to, or acquired by, an owner of land for the purpose of the better enjoyment of his land, is an easement. It extends to such owner's licensees, and passes with the land to any future owner.

7.—When a man sells a part of his land to which there is no access except by passing over another portion of the vendor's land, the purchaser acquires by implied grant a way of necessity over the vendor's land.

8.—An easement of way is limited to the user defined or implied in the grant, or to such user as existed at the commencement of the prescriptive period.

9.—A servient owner is not bound to keep in repair a footpath or road over which a right of way exists. The dominant owner is, however, entitled to do any necessary repairs himself.

CHAPTER XI.

The Extinguishment, Suspension, and Revival of Easements.

An easement may be extinguished by **Act of Parliament,** by **operation of law,** or by the **act of the dominant owner.**

With regard to the first method little need be said. An instance would occur in the case of land purchased by a Local Authority under the Housing of the Working Classes Act, 1890, which Act provides that easements over the land acquired shall be extinguished, but entitles the dominant owner to compensation. Extinguishment by Act of Parliament.

Extinguishment by operation of law will occur in such a case as where the easement has been granted for a particular purpose, and that purpose is fulfilled, though there may be cases in which the fulfilment of the purpose only operates as a suspension, and not as a complete extinction of the easement. In other words, if circumstances should at any future time arise similar to those under which the easement was granted, the right would revive. By operation of law.

To give another illustration of extinguishment by operation of law, "easements of necessity" terminate when the absolute necessity ceases, as already explained.

Effect of alteration to dominant tenement.

Any alteration to the dominant tenement which is of such a nature as to substantially change in character the mode of user of an easement, or whereby the burden on the servient tenement is materially increased, will cause the extinction or suspension of an easement, unless the easement was intended for the benefit of the dominant tenement, to be used for any purpose and in any manner whatsoever. For example, where a right had been granted for the purpose of being used as a way to a cottage, and the garden of the cottage was changed into a tan-yard, the right of way ceased.[1] If there had existed a right of way to the cottage *for all purposes*, the right would not have been lost by reason of the cottage being altered. It is difficult to lay down any rule as to what constitutes a substantial alteration, and each case must depend upon particular circumstances.

Increase of burden.

Right to obstruct.

If the dominant owner increase the burden on the servient tenement, the servient owner has a right to obstruct the excessive or increased enjoyment of the easement, but he must not obstruct the enjoyment to which the dominant owner is lawfully entitled. If, however, it is impossible for him to obstruct the excess only, the servient owner may (*except in the case of "light"*), obstruct the easement altogether. For instance, if the dominant owner has a right to send clean water through a ditch on the servient owner's land, and instead of sending clean water he exceeds his right by sending dirty water, in such a case, as the servient owner cannot obstruct the excessive enjoyment of the easement without stopping the water entirely, he is entitled to do so. In the case

[1] *Henning* v. *Burnett*, 8 Ex. 187.

of ancient lights, however, when the dominant owner increases the size of his windows, the servient owner may only obstruct the enlarged portion: and if he is unable to do this without also obstructing the "ancient" part of the windows, he has no remedy.

In another case, the easement was a right to pollute a stream by pouring in the refuse of a fellmongery, and the washings of dyes used in a coloured rug manufactory. The fellmongery was afterwards abandoned, and the manufacturing of leather boards substituted. The pollution was less than that caused by the old business, but still it was held that as the purpose for which the easement had been acquired had ceased, the prescriptive right did not extend to the new trade, and the easement was therefore lost.[1] The general rule is, however, that if the burden on the servient tenement is not materially increased, the change being unsubstantial and the mode of user practically similar to what it was before, the easement will not be destroyed.

Change of purpose.

Another way in which easements may be put an end to by operation of law is when the dominant and servient tenements become united in one and the same ownership, or "seisin," as it is technically called. This is good sense as well as good and long-established law, for since easements are, by their essential nature, rights possessed by the owner of one piece of land in or over the land of another, if the seisin in the two pieces is united in one owner, the right must necessarily cease to be an easement, inasmuch as it becomes one of the rights of property

Unity of seisin.

[1] *Clarke* v. *Somerset Drainage Commissioners*, 57 L.J. M.C. 96.

to which all owners of land are entitled. But an easement of light will not be extinguished merely by unity of seisin of the dominant and servient tenements: there must be *unity of occupation* as well as *unity of seisin* of the freehold.[1]

Unity of possession.

Unity of possession of the dominant and servient tenements, for different "estates," merely causes suspension, and not extinction, of an easement. Thus, in a case where two tenements were in the possession of one person, one tenement being his freehold, and the other held by him on a lease for five hundred years, it was held that this union did not extinguish, but only suspended, an easement during the unity of possession, and that the right revived on severance of the tenements.[2]

Release.

Coming now to the extinguishment of easements by the act of the dominant owner, we will first consider a release (that is, a re-grant) of the easement by the dominant to the servient owner. If the release or re-grant is express, it can only be effected by deed; but an implied release may be inferred from cessation of user, and the surrounding circumstances, and is in fact tantamount to an abandonment of the easement.

Abandonment.

In the case of discontinuous easements, if there is direct evidence of an intention to abandon the right, it may be shown to be abandoned irrespective of any period of non-user; but if the evidence is of an indirect character, non-user for twenty years at least should be proved in order to justify the Court in presuming an abandonment.

[1] *Richardson* v. *Graham*, (1908) 1 K.B. 39.
[2] *Thomas* v. *Thomas*, 2 C. M. & R. 34.

Though non-user is, as a rule, the principal evidence of abandonment, the real question to be answered when deciding whether an easement has been abandoned or not, is, What was the *intention* of the servient owner when he gave up the user? In a well-known "light" case on this point,[1] the Court of Appeal held that the fact of there being no existing windows, the access of light to which would be interfered with, was no objection to the granting of an injunction, if the right to access of light to windows which had previously existed, had not been abandoned. In other words, the fact that a building with ancient lights is pulled down, does not destroy the right to light if it be the evident intention of the owner to build new premises, preserving the ancient lights. "We must assume for this purpose," said Lord Justice Brett, "that the building while it existed had the right to have its ancient lights unobstructed. The building is pulled down, and it is said that that right is in abeyance. It seems to me that until the right is abandoned it is as much in existence after the building is pulled down, as it was before, and I cannot help thinking that where a man has a legal right which can only be lost by his abandoning it, if he has not abandoned it, and until he abandons it, it exists, and is as much in his possession as ever, although his actual enjoyment of it may be suspended."

Right of light may be in abeyance.

So also, in another case,[2] it was held that a right of way for boats along a stream leading to a public river, was not lost by the owner of the right allowing

[1] *Ecclesiastical Commissioners* v. *Kino*, 14 Ch.D. 213.
[2] *Bower* v. *Hill*, 1 Bing. N.C. 549.

a part of the stream to become filled with mud, even though it remained impassable for sixteen years, for he might at any time have removed the mud, if he wished to navigate the stream.

What was the intention of the dominant owner?

The material question, in all cases of this kind, is, Was it the *intention* of the dominant owner to abandon or renounce his right? This question, we repeat, must be decided according to the acts of the party who is presumed to have abandoned his right, and from the special circumstances of any case under consideration. The interpretation of these circumstances may often be a matter of considerable difficulty. For instance, it may happen that there is no other circumstance by which to determine the question of abandonment than non-user for a certain period of time. But what period? The reasoning that applies to one case may not apply to another. In an old case[1] it was held that, under the particular circumstances, non-user of a right of access to mines, was not, of itself, sufficient ground for presuming that the right had been released. The precise period requisite to extinguish an easement by mere non-user, has not indeed been determined by any express decision, but, as previously stated, twenty years' non-user would be strong evidence of abandonment. However, the duration of the non-user must always be considered in conjunction with the nature of the particular easement concerning which the question arises, and a temporary cessation of user may sometimes be explained by evidence.

Extinguishment by license.

An easement may also be extinguished by the license of the dominant owner, as was explained in Chapter II, p. 22, when dealing with licenses.

[1] *Seaman* v. *Vawdrey*, 16 Ves. 390.

Revival of natural rights.

The subject of the revival of easements and natural rights may be briefly dealt with. Any right which is merely suspended will revive when the cause of suspension is removed, but a right which is altogether extinguished can never revive. It will be remembered that a natural right cannot be extinguished, but may be suspended by an easement adverse to it. Thus, a right to the uninterrupted flow of water in a natural stream may be temporarily suspended by an easement to obstruct the flow: but when the easement is extinguished, the natural right revives.

Revival of easements.

The question as to whether an easement can be revived depends entirely upon fact. If it can be proved that the easement has been abandoned, it cannot be revived, but only re-created by grant or prescription. If it can be proved that the easement has only been suspended, it can be revived at any time.

In one case[1] the Court held that the fact of severance of the property in a certain inn, and an adjoining yard, would not raise a presumption of release of a right of way appurtenant thereto, for there was evidence only of a temporary discontinuance of the enjoyment, or, at the most, a temporary suspension of the right, and not of extinguishment of it; and that consequently, if the property in the severed parts of the dominant tenement were re-united at any time, the dominant owner would be at liberty to resume the user.

[1] *Bower* v. *Hill*, 2 Bing. N.C. 339.

SUMMARY OF CHAPTER XI.

1.—An easement may be extinguished—

(*a*) By Act of Parliament.
(*b*) By operation of law.
(*c*) By act of the dominant owner.

2.—Examples of extinguishment of easements by operation of law are—

(*a*) Fulfilment of purpose.
(*b*) Cessation of necessity.
(*c*) Substantial change in nature of dominant tenement.
(*d*) Change in user, so as to increase the burden on the servient owner in a way which cannot be resisted (except in the case of an easement of light).
(*e*) Unity of seisin and occupation.

3.—Examples of extinguishment of easements by act of dominant owner are—

(*a*) Release (express or implied).
(*b*) Abandonment—in which case *intention* to abandon must be proved.
(*c*) License.

4.—An alteration to a dominant tenement may be of such a nature as to only suspend an easement, and not to constitute an abandonment.

5.—Unity of possession without unity of seisin causes a suspension, and not an abandonment, of an easement.

6.—A natural right is never abandoned; it is only suspended during the existence of an easement, and revives on the extinguishment of the easement.

7.—An easement which has been suspended can be revived. One which has been abandoned cannot be revived; it must be re-created.

CHAPTER XII.

Remedies.

The main object of this small treatise is to show to a student or layman what rights are attached, in the ordinary way, to the ownership of property, and what rights may be added thereto: such added rights being confined more particularly to Easements. The work cannot, however, be complete unless some explanation is given of the protection afforded by the law to owners of land, whose rights may be interfered with by other persons, although a description of the mode of procedure in bringing or defending an action at law is beyond its scope.

Three kinds of remedies.

There are three methods which can be adopted by a person over whose land a privilege, interfering with his proprietary or natural rights, is being enjoyed. In order to obtain relief or redress these are:—

Remedies in case of interference with ordinary rights.

1. To obstruct the exercise of such privilege by physical means (*e.g.*, erecting a screen to prevent light from his own land from entering his neighbour's windows).
2. To apply to the Court for an injunction to restrain an adjoining owner from doing something which interferes with his ordinary rights (*e.g.*, an action for an injunction to prevent an adjoining owner excavating his land in such a way as to interfere with a natural right of support).

3. To bring an action for damages (and an injunction in addition, if the circumstances warrant it), caused by an interference with his ordinary rights (*i.e.*, an action for a money payment equivalent to the damage sustained).

Remedies of a dominant owner

The remedies of a dominant owner, in case a servient owner interferes with his easement, are as nearly as possible the same as given above. They differ, however, mainly in the first-named case, viz., that of the adoption of physical means for obtaining redress. An owner of land has no right to enter the land of another for the purpose of obtaining, by his own hands, redress for a grievance he may sustain, and, if he does so, it is at his own risk. He may only redress a grievance by physical means by doing something on his own land. If he enter his neighbour's land he is liable for trespass. Hence we see that, although a man may prevent an easement of light from being acquired over his land by physical means (*i.e.*, by erecting a screen), a man who has acquired an easement of light over the land of his neighbour has no right to adopt physical means of redress, because the pulling down of a screen or building on a neighbour's land means also a trespass.

Trespass.

Interference with right of way.

The point is further exemplified in the case of one person having a right of way over the land of another. Suppose A has a right of way over B's land; it is no trespass for A to enter B's land. If B erect a fence interfering with A's passage, A may pull it down, even if such fence be in the middle of B's land.

The above examples show that a person may prevent the acquisition of an easement over his own land, or the interference with an existing easement which he enjoys over the land of another, by physical means, provided, in so doing, he does not trespass on the land of his neighbour; and that the right belongs not only to a dominant owner, but also to an owner who, unless he prevents the acquisition of an easement, runs the risk of becoming a servient owner.

Certain forms of injury are limited to certain forms of redress.

In cases where physical remedies are inapplicable, an action at law must be brought in order to obtain redress for a grievance. An action may be either (*a*) for a money claim representing the value of the damage sustained, or (*b*) for an injunction—*i.e.*, for an order of the Court requiring the defendant to perform some act (*e.g.*, to remove an obstruction), or to refrain from doing something (*e.g.*, to discontinue the erection of a building which would, when completed, interfere with a right to light).

From what has been said above, it will be seen that the kind of remedy which it behoves an owner to adopt, when his rights are being interfered with, depends largely on the circumstances of the case. Thus:—

If A excavates his land so as to endanger the natural right of support to B's land, B can apply for an injunction to restrain A from continuing the excavation. The Court will grant an injunction if it can be shown that A's excavation has been, or his further contemplated excavation is, such as to endanger B's land. If, however, A excavates his land to such an extent as to actually cause B's land to subside, it will be too late to obtain an injunction

to prevent what has already happened. B can, however, bring an action for the money value of the damage he has suffered, and, in addition, for an injunction to prevent further excavation.

Again, suppose A erects buildings on his land so as to obstruct B's ancient lights, B may either bring an action against A for an injunction to restrain A from building further, or to compel him to pull down the building already erected, or he may claim damages in money to compensate him for the injury caused to his property.

No damages obtainable against a trespasser who merely redresses his own grievances.

The illegality of committing a trespass for the purpose of abating a nuisance, is not such a severe deprivation of rights as it appears at first sight. Suppose A has a right of light to his window over B's land, and B erects a screen blocking out the light; A's proper course of procedure is undoubtedly to apply to the Court for an injunction to compel B to remove the screen, or else to bring an action for damages against B. Suppose, however, that A, instead of taking legal action, takes illegal action by trespassing on B's land, and pulling down the screen. All the damage which A will have sustained, by reason of the erection of the screen, will be the amount of labour expended by him in removing it. B is, of course, entitled to bring an action against A for damages occasioned by the trespass; but he cannot be awarded any damages in respect of the removal of the screen, because, in this case, he had no right to erect it. B can, in such case, only recover from A the value of *any other damage* that A may have caused to his premises.

It is, nevertheless, unadvisable to commit a trespass for the purpose of abating a nuisance; if not for

any other reason, certainly for this practical one, viz., that if the servient owner afterwards recommences the nuisance, the dominant owner is again put to the trouble of trespassing, and the process may continue *ad infinitum*. It is far better to obtain redress through the Court in the first place.

It is better not to take the law into one's own hands.

There are, according to Coke,[1] two ways of redressing a nuisance—*first*, by action to recover damages and for judgment that the nuisance shall be removed or abated, as the case requires; and, *secondly*, by the aggrieved party abating the nuisance himself.

It is clear that if a man obstruct a flow of water to which another is entitled, or obstruct a right of way, the aggrieved party can himself remove the obstruction. This remedy should, however, be used very carefully. There is always some risk attaching to it, because in cases where the only means of obtaining an abatement, by physical means, involves a trespass on the servient tenement, and such tenement is in the actual occupation of the owner, it is likely to lead to a breach of the peace. In abating a private nuisance a party is bound to take reasonable precautions that no more damage is done than is necessary for effecting his purpose, without injury to third parties. It is, in fact, always dangerous to "take the law into one's own hands." The proverb, "More haste, less speed," applies; and the impatient man, instead of avoiding litigation by this means, will very often incur it more certainly and more swiftly.

[1] *Batten's* Case, 9 Rep. 54.

High Court now capable of administering Law and Equity concurrently.

The old authorities laid it down that the remedy *by act of law* for the disturbance of an easement was either by action at law, or by suit in equity: but by the Judicature Act, 1873 (36 & 37 Vict., c. 66, ss. 16, 24, 25), the jurisdiction, both of the Court of Chancery and of the Common Law Courts, was transferred to the High Court of Justice, which now administers law and equity concurrently. The distinction between *law* and *equity* in all disputes respecting procedure was thus abolished, and the old forms of procedure superseded. With respect to proceedings in a County Court, it may be noticed that by the County Courts Acts, 1888 and 1903, the County Courts have jurisdiction to try any action in which the title to an easement or licence comes in question "where neither the value nor reserved rent of the lands, tenements, or hereditaments in respect of which the easement or licence is claimed, or on, through, over, or under which such easement or licence is claimed, shall exceed the sum of one hundred pounds by the year."

Jurisdiction of County Court.

Actual damage and legal damage.

In some cases, before actions can be maintained for the disturbance of rights, it is necessary to prove actual damage. Actual damage is essential to support an action for disturbance of a natural right, but the law will generally allow presumption of damage to be made in the case of disturbances of easements (as distinguished from natural rights), although no actual damage has resulted to the dominant owner, because any disturbance of an easement must be an injury to the right of the owner, since it tends to call his right in question and to afford evidence against his title.[1]

[1] *Bondini* v. *Backhouse*, 9 H.L.C. 503.

When actual damage is requisite to give a cause of action for disturbance, or if the user of an easement is obstructed, the damage or obstruction must be substantial in its character. It is not sufficient to show a merely nominal amount of injury, or a trifling obstruction.

Temporary damage.

As an easement is a benefit attached to the dominant tenement, the party in possession may sue in respect of an interference with its enjoyment, even though such interference is of a temporary nature only; and if the interference is of a permanent nature, and injurious to the inheritance, the reversioner may also bring an action for the same disturbance. Thus, in an action for injury to the plaintiff's reversionary interest in a house, by the erection of a hoarding which obstructed its ancient lights,[1] Mr. Justice Williams said: "If at the trial it appears that the thing complained of is of a mere transitory character, the jury will come to the conclusion that it is not such an injury as to entitle the plaintiffs to maintain the action. But it may be that this hoarding may have been kept up in denial of the plaintiffs' title to the window in question, in which case it might furnish a serious body of evidence against them, if ever their rights should come to be contested."

In another case[2] the Court thought that the making of fires, and causing smoke, was not an act of a permanent nature, so as in itself to be an injury to the reversion. But there are abundant authorities

[1] *Met. Assoc.* v. *Petch*, 5 C.B. N.S. 504.

[2] *Simpson* v. *Savage*, 1 C.B. N.S. 347.

to the effect that, though the injury complained of may not be of a permanent nature in the sense of lasting for years, yet it might be permanent in the sense of its being an injury to the reversion.

Right of a temporary owner.

An action for the obstruction of ancient lights may be brought by any person who has an interest in the building to which the right is attached, and who has suffered injury by such obstruction. For instance, a tenant from year to year may obtain an injunction to restrain the obstruction, but it will, it seems, be limited to the period of the remainder of his term of holding.

Right of reversioner.

If the obstruction is of a permanent character and injurious to the reversion, the reversioner may bring an action either for an injunction or damages: but if the injury caused by the obstruction is only an injury to the occupier of the house, the reversioner cannot sue.

Continuance of, or repetition of, interference with rights.

An action may be brought for continuing, as well as for creating, anything by which an easement is disturbed; and if the disturbance of an easement is continued after an action has been brought and damages recovered for the original act of disturbance, or if a fresh disturbance arises from the original act, a second action may be brought for the continuance, or the fresh damage sustained; and the judgment in the first action is no bar to the right to bring the second, whether it is at the suit of the dominant owner, or of the reversioner. In a case already referred to,[1] the lessees of coal under the respondent's land had worked the coal so as to cause a subsidence of the land and injury to houses thereon in the year

[1] *Mitchell* v. *Darley Main Colliery*, 11 App. Cas. 127.

1868. For the injuries thus caused the lessees made compensation. They worked no more; but in 1882 a further subsidence took place, causing further injury. There would have been no additional subsidence if an adjoining owner had not worked his coal, or if the lessees had left enough support under the respondent's land; and it was held that the cause of action in respect of the further subsidence did not arise until such subsidence occurred, and that the respondent could maintain an action for the injury thereby caused, although more than six years had passed since the last working by the lessees.

The remedy for a continuous disturbance of an easement, which was at one time afforded at law by an indefinite series of actions, was obviously, in many cases, quite inadequate, and the Court of Chancery has always exercised the power of interfering by injunction to stop the whole mischief complained of. As we have before stated, the jurisdiction both of the Court of Chancery and of the Common Law Courts is now vested in the High Court of Justice, which has power to entertain legal and equitable claims and defences alike, and which usually adjudicates upon a large number of claims for injunctions for obstruction of light and air, pollution of streams, and disturbances of other kinds of easements.

It is impossible to lay down any general rule as to the cases in which the Judges will interfere in this way. We may, however, point out that though in most cases it happens that when an injunction is applied for, the act of obstruction has already commenced, and damage to some extent

Injunction obtainable in some cases before damage suffered.

has occurred; yet there are many cases in which the Courts will restrain the disturbance of an easement when there is nothing more than a reason to fear disturbance—when the action, to use the technical phrase, is merely *quia timet* (= because he fears). But it is not in every case of threatened disturbance that the Court will act. It has been held that in order to maintain a *quia timet* action to restrain an apprehended injury, the plaintiff must prove imminent danger of a substantial kind, or that the apprehended injury, if it does come, will be irreparable.

In a case that has been decided,[1] the plaintiff was a manufacturer of paper, his mills being situated on the bank of a river, the water of which he used to a large extent in his process of manufacture, for which purpose it was essential that the water should be very pure. The defendants, who were alkali manufacturers, were depositing on a piece of land close to the river, and about a mile and a-half higher up than the plaintiff's mills, a large heap of refuse from their works. It was proved that, in the course of a few years, a liquid of a very noxious character would flow from the heap, and would continue flowing for forty years or more, and that if this liquid should find its way into the river to any appreciable extent, the water would be rendered unfit for the plaintiff's manufacture, and his trade would be ruined. The plaintiff did not allege that he had as yet sustained any actual injury. The defendants said that they intended to use all proper precautions to prevent the noxious liquid from

[1] *Fletcher* v. *Bealey*, 28 Ch.D. 688.

getting into the river; and it was held by Mr. Justice Pearson that, it being quite possible, by the use of due care, to prevent the liquid from flowing into the river, and it being also possible that, before it began to flow from the heap, some method of rendering it innocuous might have been discovered, the action could not be maintained, and must be dismissed with costs. The dismissal, however, was expressly declared to be without prejudice to the right of the plaintiff to bring a fresh action in case of actual injury or imminent danger.

Mandatory injunction.

The subject of mandatory injunctions also calls for some notice. A *mandatory* injunction is one which compels the defendant to perform an act, the effect of which is to restore matters to the position in which they stood before the injury, of which the plaintiff complains, was committed. This jurisdiction is always exercised by the Court with caution, and in some of the earlier cases it was said that *extraordinary* caution was needed. But in an "ancient lights" case,[1] Jessel, the Master of the Rolls, repudiated the idea that a larger amount of judicial caution was needed in granting orders of this nature than ought to be shown in granting any other kind of injunction.

An order for a mandatory injunction will not, as a rule, be made except at the hearing, unless the defendant has endeavoured to anticipate the action of the Court by hurrying on the work complained of pending litigation, or after notice; or unless it is shown that irreparable mischief will be done if the injury is allowed to continue until the hearing.

[1] *Smith* v. *Smith*, L.R. 20 Eq. 500.

When granted.

The comparative convenience or inconvenience of the procedure is an essential matter for consideration on the question whether a mandatory injunction should be granted or withheld, and in this connection the Court will have regard to the point whether or not the damage can be estimated and sufficiently compensated by a pecuniary payment. Originally the Court of Chancery had no jurisdiction to award damages. The power to do so was conferred by the Chancery Amendment Act, 1858, more commonly known, from the name of its author, as "Lord Cairns's Act" (21 & 22 Vict. c. 27). Independently, however, of this Statute, the High Court of Justice can, under the Judicature Act, award either an injunction or damages, the discretion of the Judges being one to be reasonably and cautiously exercised, according to the facts of the particular case, it not being possible to lay down any general rule. It is true that where the defendant has erected or substantially erected his building, either after action brought, or otherwise, with notice of the plaintiff's right and in defiance of his protests, the Judges have absolutely refused to allow him to compensate the plaintiff with damages, and have forced him to pull down his building. But except in such cases of wilful breach of duty the Courts have declined to fetter their discretion.

The tendency of the earlier decisions was to award damages in preference to a mandatory injunction, whenever the injury to the plaintiff could be reasonably estimated in money—whenever, in fact, the injury was not irreparable except by the restoration of the previous condition of things. But recently the inclination of the Judges appears to have been

to exercise the discretion only in cases where the damage to the plaintiff, although not so trifling as to exclude the jurisdiction altogether, is yet small in amount and capable of being amply compensated by a money payment: and when there are special circumstances which would make it oppressive to grant an injunction.

When damages are awarded they are estimated according to the diminution of value, not only for the purposes of the occupation or business for which the premises are used at the time when the action is brought, but also to which they may in future be made applicable. The character of the neighbourhood and the interest the plaintiff has in the building must also be taken into consideration. Damages, how estimated.

SUMMARY OF CHAPTER XII.

1.—The three remedies of an owner whose rights are being interfered with are—

(*a*) To abate the nuisance himself.

(*b*) To apply to the Court for an injunction compelling the defendant to abate the nuisance.

(*c*) To bring an action for the money value of the damage caused by the interference.

2.—An owner has no legal right to trespass on his neighbour's land, even though his object is to redress a grievance. His only *legal* right in such a case is to obtain redress through the Court.

3.—The particular kind of legal remedy which is applicable in any case can only be decided by the Court. As a rule, in case of an injury, the Court will be

in favour of a settlement by payment of the money value of the damage caused, rather than that of granting an injunction.

4.—If an owner of land trespass on the land of his neighbour for the purpose of removing something which interferes with his own rights, his neighbour, although entitled to bring an action for trespass, can sustain no money claim for damage caused by the removal of the obstruction, unless damage was done to the land by such removal.

5.—A physical remedy which involves a trespass is not a satisfactory one, since, in the event of a renewal of the obstruction, a repetition of the trespass becomes necessary. It is better not to take the law into one's own hands.

6.—Any person who has an interest in a tenement (whether freeholder, lessee, yearly tenant, &c.) may bring an action against any person interfering with his rights. The damages he can claim are, however, limited to the depreciation in the value of *his own interest*.

7.—The settlement of one action does not interfere with an aggrieved party's right to a further action in case damage is continued or repeated. In order to succeed in an action a plaintiff must, by the Statutes of Limitations, commence it within six years of the date of the suffering of the injury.

8.—The general practice of the Courts is to award damages in preference to granting an injunction, particularly in cases where the injury to the plaintiff's rights is—(1) small, (2) capable of being compensated by a money payment, and (3) where it would be oppressive to the defendant to grant an injunction.

APPENDIX.

THE PRESCRIPTION ACT, 1832.

(2 and 3 Will. IV., Cap. LXXI.)

An Act for shortening the Time of Prescription in Certain Cases. [*1st August, 1832.*]

WHEREAS the Expression, 'Time Immemorial, or Time whereof the Memory of Man runneth not to the contrary,' is now by the Law of *England* in many Cases considered to include and denote the whole Period of Time from the Reign of King *Richard* the First, whereby the Title to Matters that have been long enjoyed is sometimes defeated by showing the Commencement of such Enjoyment, which is in many Cases productive of Inconvenience and Injustice; for Remedy thereof be it enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That no Claim which may be lawfully made at the Common Law, by Custom, Prescription, or Grant, to any Right of Common or other Profit or Benefit to be taken and enjoyed from or upon any Land of our Sovereign Lord the King, His Heirs or Successors, or any Land being Parcel of the Duchy of *Lancaster* or of the Duchy of *Cornwall*, or of any Ecclesiastical or Lay Person, or Body Corporate, except such Matters and Things as are herein specially provided for, and except Tithes, Rent, and Services, shall, where such Right, Profit, or Benefit,

Claims to Right of Common and other Profits à prendre, not to be defeated after Thirty Years' Enjoyment by shewing the Commencement:

shall have been actually taken and enjoyed by any Person claiming Right thereto without Interruption for the full Period of Thirty Years, be defeated or destroyed by shewing only that such Right, Profit, or Benefit was first taken or enjoyed at any Time prior to such Period of Thirty Years, but nevertheless such Claim may be defeated in any other Way by which the same is now liable to be defeated; and when such Right, Profit, or Benefit shall have been so taken and enjoyed as aforesaid for the full Period of Sixty Years, the Right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some Consent or Agreement expressly made or given for that Purpose by Deed or Writing.

after Sixty Years' Enjoyment the Right to be absolute, unless had by Consent or Agreement.

II. And be it further enacted, That no Claim which may be lawfully made at the Common Law, by Custom, Prescription, or Grant, to any Way or other Easement, or to any Watercourse, or the Use of any Water, to be enjoyed or derived upon, over, or from any Land or Water of our said Lord the King, His Heirs or Successors, or being Parcel of the Duchy of *Lancaster* or of the Duchy of *Cornwall*, or being the Property of any Ecclesiastical or Lay Person, or Body Corporate, when such Way or other Matter as herein last before mentioned shall have been actually enjoyed by any Person claiming Right thereto without Interruption for the full Period of Twenty Years, shall be defeated or destroyed by shewing only that such Way or other Matter was first enjoyed at any Time prior to such Period of Twenty Years, but nevertheless such Claim may be defeated in any other Way by which the same is now liable to be defeated; and where such Way or other Matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full Period of Forty Years, the Right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some Consent or Agreement expressly given or made for that Purpose by Deed or Writing.

In Claims of Right of Way or other Easement the Periods to be Twenty Years and Forty Years.

III. And be it further enacted, That when the Access and Use of Light to and for any Dwelling House, Workshop, or other Building shall have been actually enjoyed therewith for the full Period of Twenty Years without Interruption, the Right thereto shall be deemed absolute and indefeasible, any local Usage or Custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some Consent or Agreement expressly made or given for that Purpose by Deed or Writing.

Claim to the Use of Light enjoyed for 20 Years indefeasible, unless shewn to have been by Consent.

IV. And be it further enacted, That each of the respective Periods of Years herein-before mentioned shall be deemed and taken to be the Period next before some Suit or Action wherein the Claim or Matter to which such Period may relate shall have been or shall be brought into question, and that no Act or other Matter shall be deemed to be an Interruption, within the Meaning of this Statute, unless the same shall have been or shall be submitted to or acquiesced in for One Year after the Party interrupted shall have had or shall have Notice thereof, and of the Person making or authorizing the same to be made.

Before-mentioned Periods to be deemed those next before Suits for Claims to which such Periods relate.

V. And be it further enacted, That in all Actions upon the Case and other Pleadings, wherein the Party claiming may now by Law allege his right generally, without averring the Existence of such Right from Time immemorial, such general Allegation shall still be deemed sufficient, and if the same shall be denied, all and every the Matters in this Act mentioned and provided, which shall be applicable to the Case, shall be admissible in Evidence to sustain or rebut such Allegation; and that in all Pleadings to Actions of Trespass, and in all other Pleadings wherein before the passing of this Act it would have been necessary to allege the Right to have existed from Time immemorial, it shall be sufficient to allege the Enjoyment thereof as of Right by the Occupiers of the Tenement in respect whereof the same is claimed for and during such of the Periods mentioned in this

In Actions on the Case the Claimant may allege his right generally, as at present.

In Pleas to Trespass and other Pleadings, where Party used to allege his Claim from Time immemorial, the Period mentioned in this Act may be

alleged; and Exceptions or other Matters to be replied specially.

Act as may be applicable to the Case, and without claiming in the Name or Right of the Owner of the Fee, as is now usually done: and if the other Party shall intend to rely on any Proviso, Exception, Incapacity, Disability, Contract, Agreement, or other Matter herein-before mentioned, or on any Cause or Matter of Fact or of Law not inconsistent with the simple Fact of Enjoyment, the same shall be specially alleged and set forth in answer to the Allegation of the Party claiming, and shall not be received in Evidence on any general Traverse or Denial of such Allegation.

Restricting the Presumption to be allowed in support of Claims herein provided for.

VI. And be it further enacted, That in the several Cases mentioned in and provided for by this Act, no Presumption shall be allowed or made in favour or support of any Claim, upon Proof of the Exercise or Enjoyment of the Right or Matter claimed for any less Period of Time or Number of Years than for such Period or Number mentioned in this Act as may be applicable to the Case and to the Nature of the Claim.

Proviso for infants, &c.

VII. Provided also, That the Time during which any Person otherwise capable of resisting any Claim to any of the Matters before mentioned shall have been or shall be an Infant, Idiot, Non compos mentis, Feme Covert, or Tenant for Life, or during which any Action or Suit shall have been pending, and which shall have been diligently prosecuted, until abated by the Death of any Party or Parties thereto, shall be excluded in the Computation of the Periods herein-before mentioned, except only in Cases where the Right or Claim is hereby declared to be absolute and indefeasible.

What Time to be excluded in computing the Term of Forty Years appointed by this Act.

VIII. Provided always, and be it further enacted, That when any Land or Water upon, over, or from which any such Way or other convenient Watercourse or Use of Water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any Term of Life, or any Term of Years

exceeding Three Years from the granting thereof, the Time of the Enjoyment of any such Way or other Matter as herein last before mentioned, during the Continuance of such Term, shall be excluded in the Computation of the said Period of Forty Years, in case the Claim shall within Three Years next after the End or sooner Determination of such Term be resisted by any Person entitled to any Reversion expectant on the Determination thereof.

Not to extend to Scotland or Ireland.

IX. And be it further enacted, That this Act shall not extend to *Scotland* or *Ireland*.

Commencement of Act.

X. And be it further enacted, That this Act shall commence and take effect on the First Day of *Michaelmas* Term now next ensuing.

Act may be amended.

XI. And be it further enacted, That this Act may be amended, altered, or repealed during this present Session of Parliament.

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